TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922 1923

No. 124

WESLEY M. SMITH, APPELLANT,

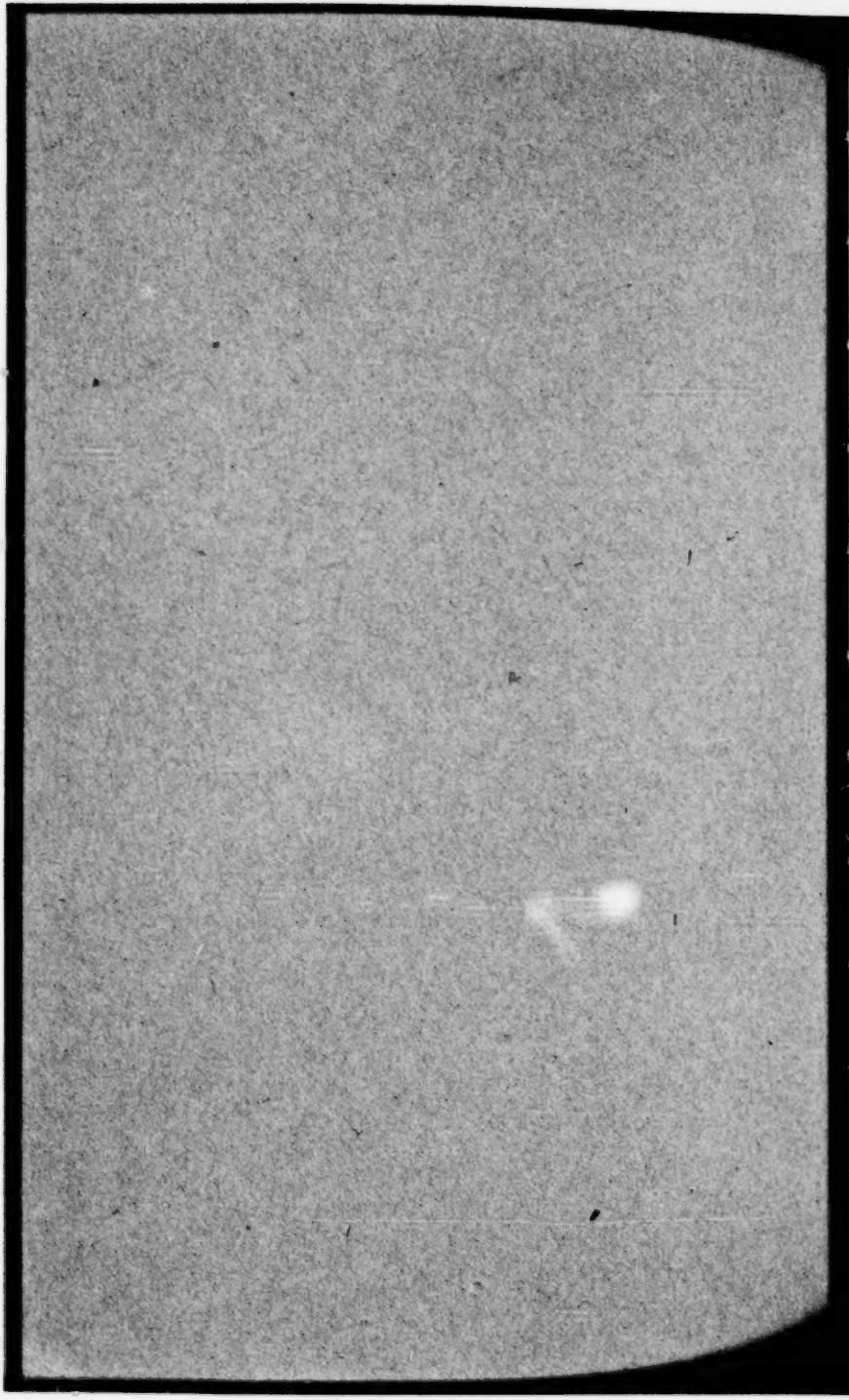
vs.

WALTER T. APPLE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED SEPTEMBER 19, 1922.

(29,152)



(29,152)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 602.

WESLEY M. SMITH, APPELLANT,

vs.

WALTER T. APPLE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

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1 In the District Court of the United States for the Third Division of the District of Kansas, at Fort Scott.

No. 149-N.

WESLEY M. SMITH, Complainant,

vs.

WALTER T. APPLE, Defendant.

Citation.

United States of America to Walter A. Apple, Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the District of Kansas, Third Division, wherein Wesley M. Smith is complainant and Walter T. Apple is defendant, No. 149-N, an appeal has been allowed the complainant therein to the United States Supreme Court.

You are hereby cited and admonished to be and appear in said court at Washington, in the District of Columbia, 30 days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Arba S. Van Valkenburgh, Judge of the United States District Court for the District of Missouri, assigned to the District of Kansas, this 8 day of September, 1922.

ARBA S. VAN VALKENBURGH,
District Judge.

Service of the foregoing Citation is hereby acknowledged this — day of September, 1922.

WALTER T. APPLE,
—— ——,
—— ——,
His Attorneys of Record.

[Endorsed:] No. 149-N. Wesley M. Smith vs. Walter T. Apple. Citation. Filed Sept. 11, 1922. F. D. Campbell, Clerk. C. N. Price, Dept. Clerk.

1½ In the District Court of the United States for the Third Division of the District of Kansas, at Fort Scott.

No. 149-N.

WESLEY M. SMITH, Complainant,

vs.

WALTER T. APPLE, Defendant.

Citation.

United States of America to Walter A. Apple, Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the District of Kansas, Third Division, wherein Wesley M. Smith is complainant and Walter T. Apple is defendant, No. 149-N, an appeal has been allowed the complainant therein to the United States Supreme Court.

You are hereby cited and admonished to be and appear in said court at Washington, in the District of Columbia, 30 days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Arba S. Van Valkenburgh, Judge of the United States District Court for the Western District of Missouri, assigned to the District of Kansas, this 8th day of September, 1922.

ARBA S. VAN VALKENBURGH,
District Judge.

Service of the foregoing Citation is hereby acknowledged this 12th day of September, 1922.

WALTER T. APPLE,
By EDWARD E. SAPP,
E. B. MORGAN,
His Attorneys of Record.

Filed Sept. 13, 1922.
F. L. CAMPBELL,
Clerk.

In the District Court of the United States for the District of Kansas, Third Division, at Fort Scott.

No. 149-N.

WESLEY M. SMITH, Complainant,

vs.

WALTER T. APPLE, Defendant.

Amended Bill of Complaint.

To the Judges of the District Court of the United States for the District of Kansas, Third Division, at Fort Scott:

By leave of Court first had and obtained, the complainant as an amended bill of complaint herein and for his cause of action against the defendant, states:

First.

That the complainant is a citizen of the State of Oklahoma, and resides and has his domicile at Miami, in Ottawa County, Oklahoma; that the defendant is a citizen of the State of Kansas, and resides at Baxter Springs, in Cherokee County, Kansas, and within the third division of the District of Kansas, and that the amount involved in this suit is more than Three Thousand ($3,000) Dollars, exclusive of interest and costs.

Second.

Complainant states that on and prior to the 4th day of November, 1912, one Leander J. Fish, a Quapaw Indian of the Quapaw Indian Tribe of Ottawa County, Oklahoma, was the owner, by patent from the United States, of the following described real estate, lying and being in Ottawa County, Oklahoma:

The East One-half (E. ½) of the Northwest Quarter (N. W. ¼) and the West One-half (W. ½) of the Northeast Quarter (N. E. ¼) and the Southeast Quarter (S. E. ¼) of the Northeast Quarter (N. E. ¼) of Section Thirty-two (32) Township Twenty-nine (29), Range Twenty-three (23) East of the Indian Meridian;

that the alienation of said land was by the acts of Congress and express terms of said patent by said Indian prohibited for a term of twenty-five (25) years from the date of the patent so issued by the United States, but said Indian had power, by reason of the Acts of Congress, to lease said land for mining purposes for a term of ten (10) years; that on the said 4th day of November, 1912, the said Indian, by virtue of his said power to lease, executed and delivered

to the plaintiff, a mining lease specified to be for a term of ten (10) years from its date, on a part of said land, viz:

On all of the East One-half (E. ½) of the Northwest One-fourth (N. W. ¼) and the West One-half (W. ½) of the Northeast One-fourth (N. E. ¼) of Section Thirty-two (32), Township Twenty-nine (29). Range Twenty-three (23) East of the Indian Meridian in said Ottawa County, Oklahoma,

which said mining lease was by the complainant duly filed for record in the office of the Recorder of Deeds, and recorded in Book 42, at Page 180; that immediately after the execution of said mining lease as aforesaid, the complainant entered upon and took possession of all of leased land, and ever since the date of said entry the complainant has been, and still is, in possession of leased lands mining and carrying on mining operations on said land under the terms of said lease.

Complainant further states that the said Leander J. Fish has an only child, a son named Joseph P. Fish; that said Leander J. Fish had, prior to the 6th day of January, 1913, made a gift to his said son of forty (40) acres of the land herein first described, subject to the restriction against alienation aforesaid, and that on
4 the 6th day of January, 1913, the said Leander J. Fish, joined by his son, the said Joseph P. Fish, acting under the power to lease granted Quapaw Indians by Act of Congress aforesaid, on the said 6th day of January, 1913, executed and delivered to this complainant a mining lease for a term of ten (10) years from the date thereof, on that part of the aforesaid two hundred (200) acres of land described as follows:

All of the Southeast Quarter (S. E. ¼) of the Northeast Quarter (N. E. ¼) of Section Thirty-two (32), Township Twenty-nine (29), Range Twenty-three (23) East of the Indian Meridian, in said Ottawa County, Oklahoma,

and that the complainant in due time caused the said lease to be recorded in the office of the Recorder of Deeds of Ottawa County, Oklahoma, in Book 34, at Page 77; that afterwards, on the 7th day of August, 1914, the said Leander J. Fish executed and delivered to the complainant a mining lease for a term of ten (10) years on that part of the herein first described lands, described as follows:

All of the Northwest Quarter (N. W. ¼) of the Northeast Quarter (N. E. ¼) of Section Thirty-two (32), Township Twenty-nine (29), Range Twenty-three (23), and the Southwest Quarter (S. W. ¼) of the Northeast Quarter (N. E. ¼) of said Section Thirty-two (32), Township Twenty-nine (29), Range Twenty-three (23) in said Ottawa County, Oklahoma,

and that the complainant caused said lease to be recorded in the office of the Recorder of Deeds, in Ottawa County, Oklahoma, in Book 38, at Page 341.

That the complainant, immediately after the execution and delivery of said leases, entered upon the lands described in said leases respectively, and began mining and carrying on mining operations thereon, and ever since the respective dates of said leases the complainant has continuously, and still is, mining and carrying on mining operations on the said lands; and, under the terms of the said leases, has paid to the lessor the royalties in said leases specified. Complainant avers that said leases, and the rights and privileges by said leases granted to this complainat, thereby constitute interest and right in real estate under the laws of the State of Oklahoma.

Section 6595 Revised Laws 1910, provides as follows:

"Real property in this State is governed by the law of this State, except where the title is in the United States."

Section 6596 Revised Laws 1910 provides as follows:

"Estates in real property, in respect to the duration of their enjoyment, are either:

First. Estates of inheritance, or perpetual estates.

Second. Estates for life.

Third. Estates for years; or

Fourth. Estates at will."

Sections 6589, 6590 and 6591 Revised Laws 1910 are as follows:

6589. "Property is either:

First. Real or immovable; or

Second. Personal or movable."

6590. "Real or immovable property consists of:

First Land.

Second. That which is affixed to land.

Third. That which is incidental or appurtenant to land.

Fourth. That which is immovable by law."

6591. "Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock or other substance."

The complainant further avers that under the decisions of the Supreme Court of the United States and the Supreme Court of the State of Oklahoma as well, construing the acts of Congress relating to said lands, a lease of said lands is held to be an alienation of an interest in said lands and is a violation of the restrictions imposed upon said

6 Indians as allottees under the acts of congress, and that the said leases under the statutes of the State of Oklahoma above set out constitutes an interest in said lands and *is* real estate within the meaning of said laws.

Third.

Complainant states that on, and prior to the 4th day of February, 1915, Zahn A. Douthat was the owner in fee of the following described real estate, situated, lying and being in Ottawa County, in the State of Oklahoma:

The Southeast Quarter (S. E. ¼) of the Southwest Quarter (S. W. ¼) and the Southwest Quarter (S. W. ¼) of the Southeast Quarter (S. E. ¼) of Section Twenty-nine (29), Township Twenty-nine (29) Range Twenty-three (23), East of the Indian Meridian;

that on the said 4th day of February, 1915, the said Zahn A. Douthat executed and delivered to the complainant, and one J. E. Pottorff, a mining lease for a term of ten (10) years on that part of said above described lands described as follows:

All of the Southeast Quarter (S. W. ¼) of the Southwest Quarter (S. W. ¼) and the Southwest Quarter (S. W. ¼) of the Southeast Quarter (S. E. ¼) of Section Twenty-nine (29), Township Twenty-nine (29), Range Twenty-three (23) East of the Indian Meridian, in Ottawa County, Oklahoma,

which mining lease was by the complainant and said Pottorff caused to be duly recorded in the office of the Recorder of Deeds for Ottawa County, Oklahoma, in Book 42, at Page 180; and that afterwards the said Zahn A. Dauthat and his wife, Katherine Dauthat, executed and delivered to the complainant and said J. E. Pottorff, a mining lease for a term of ten (10) years from date thereon, on that part of the lands herein in this paragraph first described, as follows:

7 All of the Southeast Quarter (S. E. ¼) of the Southwest Quarter (S. W. ¼) and the Southwest Quarter (S. W. ¼) of the Southeast Quarter (S. E. ¼) of Section Twenty-nine (29), Township Twenty-nine (29), Range Twenty-three (23), East of the Indian Meridian, in Ottawa County, Oklahoma;

that the complainant and said Pottorff caused said mining lease to be recorded in the office of the Recorder of Deeds of Ottawa County, Oklahoma, in Book 46 at Page 10.

Complainant avers that the said J. E. Pottorff and this complainant entered into the possession of the lands described in the two said leases immediately after the delivery of the same to them, and ever since said date have mined and carried on mining operations on the said lands under the terms of said leases, and are still mining and carrying on mining operations under the terms of said leases on said lands.

Fourth.

Complainant states that, under the laws of the State of Oklahoma, mining leases are required to be in writing, and to be recorded in the office of the Recorder of Deeds in the County where the lands are situated, and all instruments granting mining rights and privileges, together with the use of lands for mining purposes, constitute mining leases.

Complainant further alleges that, by reason of the execution and delivery of said leases, he became the owner of and vested with the title to, and interest and estate in the lands mentioned and described in the second and third paragraphs of this complaint.

Fifth.

Complainant further alleges that on or about the 12th day of July, 1916, the defendant, Walter T. Apple, filed a suit in the District Court of Cherokee County, in the State of Kansas, in which this complainant was made defendant. A copy of the petition in said suit is hereto attached marked Exhibit "A" and made a part hereof.

That the lands and leases referred to and described in said petition were the identical lands and leases mentioned and described in the second and third paragraphs of this complaint; that the complainant was compelled to answer said petition and defend said suit, and by his answer in said suit in the District Court of Cherokee County, Kansas, complainant herein, defendant in said suit, denied that the said defendant herein had any right, title or interest in and to the mining leases situated in Ottawa County, Oklahoma, aforesaid, and by said answer directly brought in issue the title and ownership in and to said mining rights and leases situated in said Ottawa County, Oklahoma, and at the first opportunity objected to and challenged the jurisdiction of the District Court of Cherokee County, Kansas, to hear and determine said suit insofar as it involved the title and estate owned by the complainant in the said lands located in the State of Oklahoma, and insofar as it sought to compel an accounting on the part of this complainant for rents, issues and profits derived by this complainant from the use and enjoyment of said lands under the provisions of his said mining leases, and urging that the District Court of Cherokee County, Kansas, was without jurisdiction to try and determine title to lands in the State of Oklahoma or to adjudge an accounting arising out of the rents, issues and profits of such lands.

The complainant further alleges that, notwithstanding the premises, the District Court of Cherokee County, Kansas, usurping the power, authority and jurisdiction to determine the title to lands in the State of Oklahoma and beyond the territorial limits of the State of Kansas and outside of the territorial jurisdiction of the courts of the State of Kansas, proceeded with the trial of said case, and at the conclusion thereof rendered a decree against this com-

plainant, adjudging the said defendant, Walter T. Apple,
9 to be a one-half owner in the estate and title conveyed and vested in the complainant by reason of the execution of the leases mentioned and described in the second and third paragraphs of this complaint, and upon an accounting of the rents and profits derived by this complainant from the said leasehold estates, located in the State of Oklahoma, rendered a judgment against this complainant for the sum of $55,042,03½, together with interest and costs from date of judgment at the rate of six (6) per cent per annum; that said judgment was based exclusively upon accounting of the rents and profits alleged to have been received by this complainant from the leasehold estates mentioned and described in the second and third paragraphs of this complainant. A copy of the judgment and decree of said court is hereto attached marked Exhibit "B" and made a part hereof.

Complainant further alleges that such proceedings were afterwards had in said case; that the judgment and decree of the said Court of Cherokee County, Kansas was appealed to the Supreme Court of the State of Kansas for review, and pending said appeal a supersedeas bond was executed by this defendant as principal, and J. E. Pottorff and G. L. Coleman as sureties, in the sum of $123,000, a copy of said bond is hereto attached marked Exhibit "C" and made a part hereof.

Complainant further alleges that in due course said cause was heard and determined in the Supreme Court of the State of Kansas and the judgment and decree of the District Court of Cherokee County, Kansas, was affirmed by said Court, but that afterwards, upon motion for re-hearing, the judgment and decree of the District Court of Cherokee County, Kansas (Exhibit "B" aforesaid) was modified by the judgment of said Supreme Court and on the 20th day of July, 1920, mandate was issued from the Supreme Court of the State of Kansas to the District Court of Cherokee County, Kansas, a copy of which said mandate is hereto attached marked for identification Exhibit "D" here referred to and made a part hereof.

That afterwards, to wit, on the 9th day of August, 1920, the District Court of Cherokee County, Kansas, modified its former judgment and decree to conform with the decision and mandate of the Supreme Court of the State of Kansas. A copy of said modi-
10 fied judgment and decree is hereto attached marked Exhibit "E" and made a part hereof.

Complainant further avers that after the decision of the Supreme Court of the State of Kansas May 8, 1920, was rendered complainant prosecuted in the Supreme Court of the United States petition for a writ of certiorari from the Supreme Court of the United States to the Supreme Court of the State of Kansas in said cause and in response to the order of the court on that behalf duly entered on the 4th day of January, 1922, incorporates herein, the said petition for writ of certiorari which, omitting the caption, is as follows, to wit:

Petition for Writ of Certiorari.

To the Honorable the Supreme Court of the United States:

The petition of Wesley M. Smith respectfully showing to the court as follows:

1.

This action was brought originally by W. T. Apple, the respondent, against Wesley M. Smith, your petitioner, for the purpose of establishing a claim of joint ownership in favor of said respondent to certain real estate, located in the County of Ottawa and State of Oklahoma. The real estate involved, consisted of lease hold estates acquired by your petitioner for mining purposes. The title to the same had been taken in the name of your petitioner and all of the costs of the development of the same has been paid by him. At the time of the commencement of this suit, to wit: July 12, 1916, the properties were and had been for sometimes prior thereto, yielding a handsome revenue. As a foundation for his claim, the respondent in his petition alleged "that on the — day of ——, 1909, the plaintiff and defendant entered into a joint arrangement, enterprise and joint venture to take mining leases upon land belonging to the Quapaw Indians and divers persons, located in Ottawa County, Oklahoma, and elsewhere." This alleged "joint arrangement, enterprise and joint venture" was alleged to have been an oral agreement. The petition below further stated that your petitioner, in pursuance of said oral agreement, acquired the leases in question, in Ottawa County, Oklahoma, but in violation of the terms thereof, took the titles in his own name and excluded the plaintiff from interest or possession therein. The petition in the court below prayed for a decree for the appointment of a receiver to take charge of the Oklahoma property; for an accounting of proceeds derived from the operation of the leases" and that the plaintiff be decreed to have an undivided one-half interest in all such property, rights, interests, contracts and leases as have been taken in the name of said Wesley M. Smith." Your petitioner, in his answer to said petition denied having ever entered into any such agreement with the respondent as that alleged in the petition; claimed absolute ownership in the property; denied that the respondent had ever contributed a dollar to the development of the property located in the State of Oklahoma, and further stated: "This defendant avers that the court is wholly without jurisdiction, power or authority to administer any partnership between the plaintiff and defendant as to property situated in the State of Oklahoma, or to adjudge or determine the rights of respective parties thereto."

2.

Thereafter such proceedings were had in the District Court of Cherokee County, Kansas, that the said cause was brought to trial,

but before the taking of any evidence therein, the following objections were made by your petitioner, to the introduction of any evidence in the case:

"Now, the defendant objects to the introduction of any evidence in this case, for the reason that the suit, as shown by the petition, is for the purpose of establishing title to real estate located in the State of Oklahoma and this court has no jurisdiction to establish title to real estate situate in another state, and because the petition fails to state facts sufficient to constitute any cause of action of any kind."

This objection was overruled in the court below and such proceedings were thereafter had in the case, that the said court entered an order and decree adjudging the respondent to be the owner of an undivided one-half interest in the said real estate located in the State of Oklahoma and directing the appointment of a receiver to take charge of and collect the revenues from said real estate and further finding that the respondent was entitled to a judgment of $55,042.03½ against your petitioner on account of royalties already derived by your petitioner from said Oklahoma property and entering a judgment against your petitioner for said sum of money in favor of the respondent.

3.

Thereafter such proceedings were had in said case, that the same was brought before the Supreme Court of Kansas for review and said judgment of the lower court was affirmed. In its opinion, affirming said judgment, the Supreme Court of Kansas, said:

"There is the further objection that, as some of the leases involved lands in Oklahoma, the court was without jurisdiction to adjudge the disposition of them, or to decree that the de-
12 fendant be required to account for the production, and apply the proceeds of the mines to the judgment rendered. The contention is that the court was without power to render judgment affecting a title to real estate in another state, as this judgment does."

4.

Thereafter, a motion for rehearing was duly filed by your petitioner in the Supreme Court of Kansas, which among other things contained the following specific allegation:

That said judgment "is in violation of the 14th Amendment of the Constitution of the United States and that part thereof which provides that: 'nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction, the equal protection of the law,' the rendering of the said judgment being without jurisdiction, being in conflict with said provision of the Constitution of the United States."

The Supreme Court of the State of Kansas entertained said motion for rehearing, passed thereon, and denied the plaintiff in

error the rights guaranteed to him by the 14th Amendment of the Constitution of the United States, specifically set up and claimed in said motion for rehearing.

Subsequent proceedings were had before the Supreme Court of Kansas, and the judgment in said court was not entered therein until the 8th day of May, 1920, at which time the judgment of the trial court was modified by order of the Supreme Court, the Supreme Court requiring that the parties transfer the property, which included title to lands lying in Oklahoma, held in their individual names, to the alleged firm of Apple & Smith, instead of transferring it to a receiver appointed by the court, as has been ordered by that court. The written opinions of the Supreme Court of the State of Kansas are reported under the title of Apple v. Smith, 105 Kan. page 732, and 106 Kan. p. 717.

5.

The petition of Wesley M. Smith, petitioner, herein, further shows, that the decrees and judgments of the trial and Supreme Courts of the State of Kansas were entered without jurisdiction, in violation of the 14th Amendment of the Constitution of the United States, and deprive this petitioner of his property without due process of law, and deny to him the equal protection of the law, in that, litigation in regard to the title of land belongs exclusively to the courts of the state where the land is located. And the petitioner further respectfully shows that no principle is better established than that the disposition of real estate, whether by deed, descent, or any other mode, must be governed by the law, and by the courts of the state where the land is situated, and that the deprivation of your petitioner of his Oklahoma property, and the issues and
13 profits arising therefrom, by the laws and courts of the State of Kansas, is the taking of such property without due process of law, and is a denial to this petitioner of the equal protection of the law, in violation of the 14th Amendment of the Constitution of the United States. That your petitioner's constitutional rights were duly and specifically set up and claimed in the pleadings and the record in the trial and Supreme Courts of the State of Kansas, and denied in violation of the supreme law of the land.

6.

A certified copy of the entire record of said case in the Supreme Court of the State of Kansas is hereby furnished, attached to and made a part of this application, and marked "Exhibit," in compliance with Rule 37 of this Honorable Court.

7.

Your petitioner is advised and believes that the said judgment of the Supreme Court of the State of Kansas, which is the court of last resort in said state having jurisdiction of this cause, is erroneous, and that this Honorable Court should require said case to be

certified to it for its review and determination, in conformity with the provisions in Section 237 of the Federal Judicial Code.

8.

The said case was decided in said Supreme Court of the State of Kansas at the time and in the manner hereinbefore set out, and against the specific allegations and claims of this petitioner, as hereinbefore fully stated.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the Supreme Court of the State of Kansas, commanding the said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the Supreme Court of the State of Kansas, in said case entitled W. T. Apple, Appellee, v. Wesley M. Smith, Appellant, No. 22362, to the end that the said case may be reviewed and determined by this court as provided by Section 237 of the Federal Judicial Code; or that your petitioner may have such other or further relief or remedy in the premises as this court may deem appropriate and in conformity with said provision of the Federal Judicial Code; and that the said judgment of the Supreme
14 Court of the State of Kansas in the said case, and every part thereof, may be reversed by this Honorable Court.

JOHN S. DEAN,
Of Topeka, Kansas;
THOMAS F. DORAN,
Of Topeka, Kansas,
Attorneys for Petitioner.

STATE OF KANSAS,
County of Shawnee, ss:

John S. Dean, counsel for Wesley M. Smith, of lawful age, being duly sworn, on oath says, that he is counsel for petitioner in the above entitled case, and that he has read the above and foregoing petition for writ of certiorari, and that he is advised and he believes the allegations therein contained are true.

JOHN S. DEAN.

Subscribed and sworn to before me, this 31st day of July, 1920.

L. D. WOLFE,
Notary Public.

My term expires Feb. 4, 1922."

Sixth.

Complainant further alleges that on or about the first day of June, 1920, he commenced an action in the District Court of Ottawa County State of Oklahoma, the same being the County within which

the leasehold estates described in the second and third paragraphs of this complaint are located against the defendant Walter T. Apple for the purpose of quieting the title to said leasehold estates in the said complainant. A copy of the petition in said action in said District Court of Ottawa County, Oklahoma, is hereto attached marked for identification Exhibit "F," here referred to and made part of this bill of complaint. The defendant Walter T. Apple was duly and personally served with summons in said action and duly entered his appearance therein and filed an answer to the petition of the
15 plaintiff therein; a copy of which said answer is hereto attached marked for identification Exhibit "G," here referred to and made part of this bill of complaint; that by said answer the said defendant interposed as a defense in said cause the aforesaid judgment of the District Court of Cherokee County, Kansas, and claiming for said judgment in the District Court of Ottawa County, Oklahoma, full faith and credit for the said judgment of the District Court of Cherokee County, Kansas; that the said judgment was res adjudicata as against the said plaintiff Wesley M. Smith and in favor of the said defendant Walter T. Apple.

Complainant further avers that in said cause in the District Court of Ottowa County, Oklahoma, the plaintiff therein, complainant herein, interposed a demurrer to the answer of the said defendant Walter T. Apple; that thereafter the said demurrer came on for argument before the District Court of Ottawa County, Oklahoma, and was argued to the Court by counsel for plaintiff and by counsel for defendant.

Complainant further alleges that pending consideration of said demurrer by the District Court of Ottowa County, Oklahoma, the said defendant Walter T. Apple on the 8th day of June, A. D. 1921, filed in said cause a disclaimer, copy of which is attached hereto marked for identification Exhibit "H" and is here referred to and made part of this bill of complaint; that by said disclaimer the said defendant herein, Walter T. Apple, disclaimed that he had or claimed any interest in the leases set forth in plaintiff's petition.

Complainant further avers that thereafter on the 13th day of June, 1921, the said cause of Wesley M. Smith vs. Walter T. Apple in the District Court of Ottawa County, Oklahoma, was duly tried in the said District Court of said Ottawa County, Oklahoma, upon the pleadings and the evidence submitted in said cause and judg-
16 ment was duly entered in said cause in favor of the complainant herein and against the said defendant herein and adjudging and decreeing that the said defendant Walter T. Apple did not have and never had any interest whatever in any part of the leasehold estates described in the second and third paragraphs of this complaint. A copy of the said judgment and decree of the District Court of Ottawa County, State of Oklahoma, is hereto attached marked for identification Exhibit "I" and made part hereof.

Seventh.

Complainant further alleges that on or about the first day of June, 1920, he commenced another action in the District Court of Ottawa County, State of Oklahoma, in which J. E. Pottorff was joined with said complainant as plaintiff, the same being the County in which the leasehold estates described in the second and third paragraphs of this complaint are located, against the said defendant Walter T. Apple for the purpose of quieting the title to such portions of said leasehold estates as were not mentioned in the suit mentioned and described in the Sixth paragraph of this complaint and which constituted the balance of the leasehold estates mentioned and described in the second and third paragraphs of this complaint. A copy of the petition in said action in said District Court of Ottawa County, Oklahoma, in said suit of Wesley M. Smith and J. E. Pottorff against the said defendant Walter T. Apple is hereto attached marked for identification Exhibit "F-1" and is here referred to and made part of this bill of complaint. The defendant Walter T. Apple was duly and personally served with summons in said action and duly entered his appearance therein and filed an answer to the petition of the plaintiffs therein. A copy of which said answer is hereto attached
17 marked for identification Exhibit "G-1" and is here referred to and made part of this bill of complaint; that by said answer the said defendant interposed as a defense in said cause the aforesaid judgment of the District Court of Cherokee County, Kansas, and claiming for said judgment in the District Court of Ottawa County, Oklahoma, the full faith and credit for the said judgment of the District Court of Cherokee County, Kansas, and that the said judgment was res adjudicata as against the said plaintiff, Wesley M. Smith and J. E. Pottorff and in favor of the said defendant, Walter T. Apple.

Complainant further alleges that in said cause in the District Court of Ottawa County, Oklahoma, the plaintiffs therein, J. E. Pottorff and Wesley M. Smith, the complainant herein interposed a demurrer to the answer of the said defendant, Walter T. Apple; that thereafter the said demurrer came on for argument before the District Court of Ottawa County, Oklahoma, and was argued to the Court by counsel for plaintiffs and by counsel for defendant.

Complainant further alleges that pending consideration of said demurrer by the District Court of Ottawa County, Oklahoma, the said defendant Walter T. Apple on the 8th day of June, 1921, filed in said cause a disclaimer, copy of which is hereto attached marked for identification Exhibit "H-1" and is here referred to and made part of this bill of complaint; that by said disclaimer the said defendant herein, Walter T. Apple, disclaimed that he had or claimed any interest in the leases set forth in plaintiff's petition.

Complainant further avers that thereafter on the 13th day of June, 1921, the said cause of Wesley M. Smith and J. E. Pottorff vs. Walter T. Apple in the District Court of Ottawa County, Oklahoma, was duly tried in the said District Court of Ottawa County,

Oklahoma, upon the pleadings and the evidence submitted in said cause and judgment was duly entered in said cause in
18 favor of the said J. E. Pottorff and Wesley M. Smith the complainant herein, and against the said defendant herein and adjudging and decreeing that the said defendant Walter T. Apple did not have and never had any interest whatever in any part of the leasehold estates described in the second and third paragraphs of this complaint. A copy of the said judgment and decree of the District Court of Ottawa County, State of Oklahoma, is hereto attached marked for identification Exhibit "I-1" and made part hereof.

Complainant further avers that the said District Court of Ottawa County, Oklahoma, in the said two causes aforesaid—Wesley M. Smith against Walter T. Apple, and Wesley M. Smith and J. E. Pottorff against the said Walter T. Apple, had full and complete jurisdiction of the person of the said Walter T. Apple, and had full and complete jurisdiction of the lands included in the leases in the second and third paragraphs of this complaint mentioned and described and described in the petitions in said two causes; that all of the real estate and mining interests and rights in real estate covered by said mining leases was within the territorial jurisdiction of the District Court of Ottawa County, State of Oklahoma, and the said District Court of Ottawa County, State of Oklahoma, being a court of general jurisdiction had full authority and jurisdiction to render the judgments and decrees in said causes mentioned and set forth.

Complainant further avers that the said judgments and decrees of the District Court of Ottawa County, Oklahoma, Exhibits "I" and "I-1" hereto attached, constitute a complete and final adjudication that the said Walter T. Apple has and never had any right, title or interest in or to the said mining leases in the State of Oklahoma, the same being the judgment and decree of a court having full and complete jurisdiction of the person of the said Walter T. Apple and of the subject matter of the said actions, and that said judgments and decrees of the District Court of Ottawa County, Oklahoma, are entitled to full faith and credit in this court as against the said defendant Walter T. Apple.

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Eighth.

Complainant further alleges that after the entry by the District Court of Cherokee County, Kansas of its modified judgment, Exhibit "E" aforesaid, as stated in the Sixth paragraph of this complaint without any notice, actual or constructive, to this complainant and without the personal or published service of any notice or summons, the said District Court appointed a referee to take an accounting of and report to the Court the amount of royalties received by the respective parties to said suit, since the entry of the first judgment and decree of said court, Exhibit "B" hereto attached, and to take an accounting of the value of the mining leases and mining rights and mining interests in said lands described in the second and third paragraphs of this complaint. And afterwards in the absence of this complainant and without his knowledge, the said referee proceeded ex parte to take such an accounting and report his findings to

the said District Court of Cherokee County, Kansas, and afterwards still proceeding ex parte and without any knowledge or notice to this complainant, the said District Court of Cherokee County, Kansas, entered a judgment aaginst this complainant in accordance with the findings and conclusions of said referee; a copy of the Journal Entry of said judgment being hereto attached marked for identification Exhibit "J," here referred to and made part of this bill of complaint.

Complainant further alleges and shows to the Court that the judgment as shown by said Exhibit "J" was based upon the supplemental report of A. S. Wilson, referee in said case in said District Court of Cherokee County, Kansas; the said report being an accounting of rents and profits claimed to have been received by the complainant herein between the time of the rendition of judgment, Ex-
20 hibit "B" hereto attached, and the making of said report, and included also in said findings the value of the mining leases mentioned and set forth in the second and third paragraphs of this complaint; and the said judgment, Exhibit "J" includes such accounting of rents and profits and includes the value of the said mining leases mentioned and set forth in the second and third paragraphs of this complaint, such judgment being rendered by the District Court of Cherokee County, Kansas, on the 7th day of September, 1920, for the aggregate of $148,617.98 and costs, the same being in addition to the judgment, Exhibit "B" hereto attached, in the sum of $55,042.03½ and costs. And the said complainant further alleges that said lands being in the State of Oklahoma, the District Court of Cherokee County, Kansas, was without jurisdiction to determine the title to said lands or to charge the said defendant, complainant herein, with the rents and profits accruing from said lands, and was without jurisdiction to render a judgment against the said defendant, complainant herein, for the value of said mining rights and interests in said lands represented by said mining leases.

Complainant further alleges that at the time the said defendant Walter T. Apple filed said suit in the District Court of Cherokee County, Kansas, the title to the

East One-half (E. ½) of the Northwest Quarter (N. W. ¼) and the Southeast Quarter (¼) of the Northeast Quarter (N. E. ¼) of Section Thirty-two (32), Township Twenty-nine (29) North, Range Twenty-three (23) East of the Indian Meridian in Ottawa County, Oklahoma,

and the validity of the lease of this complainant to said described tract of land was involved in suit of W. P. McCullough and others against Wesley M. Smith, (243 Fed. 823), and at that time was pending in the United States Circuit Court of Appeals for the Eighth Circuit and was decided in said Circuit Court of
21 Appeals on the 20th day of June, 1917, and judgment in favor of complainant herein was reversed and the cause remanded to the United States District Court for the Eastern District of Oklahoma for trial; that the said cause was tried in the United States District Court for the Eastern District of Oklahoma and on the 18th

day of April, 1919, the said United States District Court cancelled and set aside the lease of complainant on the one hundred and twenty (120) acres above described. A copy of said judgment and decree is hereto attached marked for identification Exhibit "J-1" and is here referred to and made part of this bill of complaint; that the said United States District Court for the Eastern District of Oklahoma in said cause had jurisdiction of the parties to said action and jurisdiction of the subject matter of said action, the said lands being located in the Eastern District of the State of Oklahoma; that the said complainant Wesley M. Smith has appealed from said judgement and decree so rendered in the United States District Court for the Eastern District of Oklahoma on the 18th day of April, 1919, to the United States Circuit Court of Appeals for the Eighth Circuit and that said cause is now pending in said Circuit Court of Appeals. Complainant further alleges that since the rendition of said judgement in the United States District Court for the Eastern District of Oklahoma, Exhibit "J-1" aforesaid, the said W. P. McCullough and others interested with said McCullough have filed in the District Court of Ottawa County, State of Oklahoma, against the said Wesley M. Smith and his lessees in the sum of $455,000.00 based upon said decree, seeking to recover from said Wesley M. Smith the value of all ore mined from said lands and for damages arising out of the mining operations on said lands under the said leases from the said Leander J. Fish aforesaid. And complainant alleges that unless the said decree, Exhibit "J-1" aforesaid, shall be reversed by the United States Circuit Court of Appeals for the Eighth Circuit, that he will be liable to account to the said W. P. McCullough and his associates, at least for the rents and royalties arising out of the mining operations on said land. That said suit is now pending in the District Court of Ottawa County, Oklahoma; that the said lands are so situated in Ottawa County, Oklahoma, are the identical lands upon which the said judgements in the District Court of Cherokee County, Kansas, is based.

Defendant further avers that the title to said lands mentioned in said decree, Exhibit "J-1," together with all of the lands comprising the allotment of the said Leander J. Fish aforesaid, is further involved in suit by Mary Josephine Fish Unkle and Wilkes B. Unkle against Mary Wills, Administratrix of the Estate of Leander J. Fish, deceased, Trustee for Joe P. Fish, Mary Wills as Guardian for Joe P. Fish, J. W. Swarts, and Joe P. Fish, the said Joe P. Fish being a son and heir of said Leander J. Fish, deceased. That the said Mary Josephine Fish Unkle claims as the widow and heir at law of Leander J. Fish, deceased; that complainant avers that the said cause has been tried in the United States District Court for the Eastern District of Oklahoma, and while judgment was rendered in said cause against the said Mary Josephine Fish Unkle, the said cause has been appealed and is now pending and undetermined in the United States Circuit Court of Appeals for the Eighth Circuit; that if it should be determined that the said lands were the homestead of the said Leander J. Fish, deceased, under the laws of the

State of Oklahoma the said lease and leases from the said Leander J. Fish to the said Wesley M. Smith might be decreed and declared to be entirely void under the laws of the State of Oklahoma. But, in any event, if the said Mary Josephine Fish Unkle in the determination of said suit shall be declared to be the widow and entitled to inherit as such, she would be the absolute owner of an undivided one-half interest in and to all of said lands, and upon the determination in said cause establishing her title in said lands this complainant would be liable to suit and to an accounting to the said Mary Josephine Fish Unkle for at least one half of the rents and profits and royalties derived from the mining operations on said lands.

Complainant further alleges that one Theodore P. Emmons has filed suit in the District Court of Ottawa County, Oklahoma, against Mary K. Wills, Administratrix of the Estate of Leander J. Fish, deceased, and Joseph P. Fish, and this complainant and
23 others claiming under a deed from the said Leander J. Fish, executed in his lifetime to that portion of the allotment of the said Leander J. Fish, aforesaid, mentioned and described in the said decree, Exhibit "J-1," in which suit the said Theodore P. Emmons claims to be the owner of said lands. That the defendants in said suit claim that the said deed from the said Leander J. Fish to the said Theodore P. Emmons was, in fact, a mortgage upon said lands; that said cause is still pending and undetermined; that the said District Court of Ottawa County, Oklahoma, and the said United States District Court for the Eastern District of Oklahoma, have jurisdiction of the parties to said actions and of the subject matter of said actions, all of said lands being within the territorial jurisdiction of the District Court of Ottawa County, Oklahoma, and of the United States District Court for the Eastern District of Oklahoma.

Complainant further alleges that by reason of the premises the said decrees and judgments of the District Court of Cherokee County, Kansas are unjust, unconscionable, and that it would be unconscionable, inequitable and unjust to permit the said defendant to enforce the said judgments and decrees of the said District Court of Cherokee County, Kansas.

Eighth.

This complainant further alleges that on or about the — day of ——, 1921, the said defendant Walter T. Apple, commenced an action in the District Court of Cherokee County, Kansas, sitting at Galena, against G. L. Coleman, one of the sureties on the supersedeas bond given by this complainant as principal, a copy of which said supersedeas bond is set out as Exhibit "C" to this bill of complaint; that afterwards such proceedings were had, that said cause was removed to the United States District Court for the District of Kansas and is now pending in said court as Cause No. 436 in the Third Division at Fort Scott.

This complainant further alleges that the said judgment for $55,

042.03½ mentioned and described in the petition filed by this defendant in said cause and to supersede which the said bond was executed, was and is null and void for the reason that the court rendering the said judgment had no jurisdiction over the subject matter of said controversy; and that since the entry of said judgment the District Court of Ottawa County, State of Oklahoma, in the said two causes as hereinbefore alleged and set forth, having full jurisdiction and power over the subject matter of the controversy and in which said causes the said defendant was duly and personally served with summons and entered his appearance in said actions and filed answers in said actions, and upon full hearing and trial entered its final and conclusive judgments and decrees as set forth in the sixth paragraph of this bill of complaint, quieting the title of this complainant in the subject matter of the suit in which the judgments and decrees of said District Court of Cherokee County, Kansas, was based, and finding and adjudging and decreeing that the said defendant Walter T. Apple, never had any interest or estate in said lands or leases; that it would be unconscionable, inequitable and unjust to permit the said defendant to further prosecute the said action now pending in this court, begun by the said defendant against the said G. L. Coleman, as aforesaid.

The complainant further alleges and shows to the court that the said judgments and decrees of the District Court of Cherokee County, Kansas, being of record in said court and appearing from said records to be in full force and effect and subject to execution to be issued thereon and the said defendant, Wesley M. Smith, at this time being in the act of attempting to enforce the same by a suit now pending in this court on supersedeas bond and undertaking filed in said District Court of Cherokee County, Kansas, the complainant avers that the said proceedings in the District Court of Cherokee County, Kansas, the said judgments, orders and decrees entered therein, violate the express provisions of Section 1 of the 14th Amendment to the Constitution of the United States which provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life or liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws", and said complainant avers that the said proceedings, judgments, orders and decrees, and each and every thereof, are void and of non-effect, for the reason that the said District Court of Cherokee County, Kansas, had no jurisdiction of the subject matter of the said action and the said proceedings do not constitute due process of law and denies to the said complainant the equal protection of the laws and the said complainant invokes in his behalf the said provisions of the Constitution of the United States and claims the protection thereof.

Complainant further alleges that the enforcement of said void orders, judgments and decrees would do to this complaint great and irreparable injury; that complainant has exhausted all remedies at

law and otherwise against such void judgments and decrees and this complainant has no adequate remedy at law.

Wherefore your complainant prays:

First: that the action now pending in this court in which Walter T. Apple is the complainant and G. L. Coleman, defendant, being docket number 436, be stayed pending the final decision of this cause and that said defendant, Walter T. Apple, upon the final hearing be enjoined from further prosecuting the same.

Second: That the said defendant, Walter T. Apple, be forever enjoined from enforcing or attempting to enforce the said judgments and decrees of the District Court of Cherokee County, Kansas, entered on the 24th day of December, 1918, the journal entry of which is set out as Exhibit "B" to this petition, and the judgment and decree of the District Court of Cherokee County, Kansas, entered on the 7th day of September, 1920, a copy of journal entry of which is set out as Exhibit "J" to this petition, and for such other and further relief as he may be entitled to in equity and good conscience.

Complainant further prays that the defendant be adjudged to pay the cost of this suit.

A. SCOTT THOMPSON,
JOHN S. DEAN, AND
ASP, SNYDER, OWEN & LYBRAND,
Solicitors for Complainant.

26 STATE OF OKLAHOMA,
Ottawa County, ss:

Wesley M. Smith, of lawful age, being first duly sworn, upon his oath deposes and says that he is the complainant in the above entitled action; that he has heard read the above and foregoing amended bill of complaint and knows the contents thereof and has personal knowledge of the matters and things therein stated; that each, all and every of the allegations and statemens therein contained are true, in substance and in fact.

WESLEY M. SMITH.

Subscribed in my presence and sworn to before me this 28 day of February, 1922.

[SEAL.] A. G. CRONINGER,
Notary Public.

My commission expires Oct. 29, 1925.

27 "EXHIBIT A."

In the District Court of Cherokee County, Kansas, Sitting at Galena, Kansas.

No. —.

W. T. APPLE, Plaintiff,

v.

WESLEY M. SMITH, Defendant.

Petition.

Plaintiff, for his cause of action against the defendant alleges that on or about the — day of —, 1909, the plaintiff and defendant entered into a joint arrangement, enterprise and joint venture to take mining leases upon the lands belonging to the Quapaw Indians and divers persons located in Ottawa County, Oklahoma, and elsewhere, and for the purpose of taking mining leases in Cherokee County, Kansas, from divers persons, and for taking leases in both of said states for the purpose of agriculture, hay and other business for such time and upon such terms as could be best obtained for the purpose of prospecting, mining, sub-leasing and developing the same.

That the plaintiff and defendant were each to contribute such money as was necessary to carry on and conduct such business, venture and enterprise, and agreed each between themselves, that they would take said leases in the name of Walter T. Apple, where he could procure the right, interest, lease for mining or other purposes or assignment of royalties upon mining lands made to persons other than themselves, to a better advantage than if taken by the defendant, Wesley M. Smith.

That for the purpose of such business, venture and enterprise, the said Wesley M. Smith was to take leases, contracts, assignments of royalties upon mining lands to persons other than themselves, in his own name, where the same could be taken to a better advantage than if taken in the name of the plaintiff herein, or both of them. All of said contract being verbal.

Plaintiff also states that leases were to be taken in the joint name of Apple and Smith, where leases, rights, interests, contracts, etc., could be taken and obtained to better advantage than if taken individually by plaintiff and defendant herein. The name of Apple and Smith being the name under which said business, venture and enterprise was to be conducted.

That in pursuance of such arrangement, the said Wesley M. Smith took in his own name leases, contracts and agreements and obtained interests and rights upon the following described lands, to-wit:

Mining lease from Zahn A. Dauthat, dated February 4th, 1915, to W. M. Smith and W. J. Pottorff, on the following described real

estate: The S. E. ¼ of the S. W. ¼ and the S. W. ¼ of the S. E. ¼ of Section 29 Township 29, Range 23, East of the Indian Meridian, in Ottawa County, Oklahoma, containing 80 acres, more or
28 less. Also one certain mining lease from Z. A. Douthat and Katherine Douthat, his wife, and W. M. Smith and W. J. Pottorff, dated September 5, 1915, covering the S. E. ¼ of the S. W. ¼ and the S. W. ¼ of the S. E. ¼ of Section 29, Township 29, Range 23, East of the Indian Meridian in Ottawa County, Oklahoma.

This mining lease to run for a period of 10 years from September 4, 1915.

One mining lease from Leander J. Fish and Joseph P. Fish to W. M. Smith, dated January 6, 1913, on the S. E. ¼ of the N. E. ¼ of Section 32, Township 29, Range 23, for a term of 10 years.

One mining lease from L. J. Fish to Wesley M. Smith, dated August 7, 1914, for a term of 10 years from date, on the N. W. ¼ of the N. E. ¼ of Section 32 and Township 29, Range 23, and the S. W. ¼ of the N. E. ¼ of the same section.

One farm lease from L. J. Fish to Wesley M. Smith, dated November 2, 1914, for a term of three years on the East ½ of the N. W. ¼ and the West ½ of the N. E. ¼ and the S. E. ¼ of the N. E. ¼ of Section 32, Township 29, Range 23, East of the Indian Meridian in Ottawa County, Oklahoma.

One farm lease from Harry Crawfish to W. M. Smith, dated January 9, 1915, for a term of three years on the N. E. ¼ of the S. E. ¼ of Section 23, Township 29, Range 24, East of the Indian Meridian in Ottawa County, Oklahoma.

One farm lease from Harry Crawfish to W. M. Smith, dated January 9, 1915, on the S. E. ¼ of Section 33, Township 29, Range 24, Ottawa County, Oklahoma.

One lease from Solomon Quapaw to W. H. Smith, dated August 29, 1912, on Section 21, Township 29, Range 24, East of the Indian Meridian in Ottawa County, Oklahoma.

One farm lease from L. J. Fish to W. M. Smith, dated October 1, 1912, on Section 32, Township 29, Range 23, Ottawa County, Oklahoma.

One mining lease from Leander J. Fish to Wesley M. Smith, dated November 4, 1912, on the E. ½ of the N. W. ¼ and the W. ½ of the N. E. ¼ of Section 32, Township 29, Range 23, East of the Indian Meridian in Ottawa County, Oklahoma.

One farm lease from Alex Lewis Beaver to W. M. Smith, dated January 6, 1913, on Section 11, Township 28, Range 24, East of the Indian Meridian in Ottawa County, Oklahoma.

One assignment of mining leases from John Jones to W. M. Smith, dated June 1, 1913, covering a fourth interest in a leasehold estate, except 5 per cent royalty due Indian land owner, on the N. W. ¼ of Section 12, Township 28 N., Range 22 East of the Indian Meridian, except the N. E. ¼ of the S. E. ¼ of the N. W. ¼ of said section.

One mining lease from Alec. L. Beaver to W. M. Smith, dated March 5, 1914, on certain portions of Sections 2 and 11, in Towa-

ship 28, N., Range 24, East of the Indian Meridian in Ottawa County, Oklahoma.

One farm lease from Arthur Buffalo to W. M. Smith, dated September 30, 1914, covering certain portions of Section 29, Township 29, N., Range 22, East of the Indian Meridian in Ottawa County, Oklahoma.

29 One farm lease from Leander J. Fish to W. M. Smith, dated November 2, 1914, on the E. ½ of the N. W. ¼, and the W. ½ of the N. E. ¼ and the S. E. ¼ of the N. E. ¼ of Section 32, Township 29 N., Range 23, East of the Indian Meridian in Ottawa County, Oklahoma.

One mining lase from Francis Goodeagle, and others, to W. M. Smith, dated January 18, 1913, and covering certain portions of Section 34, Township 29 N., Range 23, East of the Indian Meridian in Ottawa County, Oklahoma.

One farm lease from Harry Crawfish to W. M. Smith, dated September 5, 1914, on certain portions of Sections 17, 20 and 21, in Township 29 N., of Range 23, East of Indian Meridian in Ottawa County, Oklahoma.

One lease from M. Track to W. M. Smith, dated September 4, 1914, on the S. W. ¼ of the S. E. ¼ of the N. W. ¼ of Section 17, Township 29, Range 23.

One lease from Solomon Quapaw to W. M. Smith, dated August 17, 1914, on certain portions of Section 21, Township 29 N., Range 24, East of Indian Meridian in Ottawa County, Oklahoma.

One lease from Martha Buffalo to W. M. Smith, dated September 30, 1914, on the S. E. ¼ of Section 26, Township 29 N., Range 22, East of Indian Meridian in Ottawa County, Oklahoma.

One lease from Dick Quapaw to W. M. Smith, dated March 12, 1915, covering certain portions of Section 27, and 34, in Township 29 N., and Section 4 in Township 28 N., all in Range 24 East of Indian Meridian in Ottawa County, Oklahoma.

One mining lease from Lizzie Cedar to W. M. Smith, dated April 3, 1915, on the S. W. ¼ of Section 29 and the S. E. ¼ of the S. E. ¼ of Section 26, and the N. E. ¼ of the N. E. ¼ of Section 30, all in Township 29 N., Range 24 East of the Indian Meridian in Ottawa County, Oklahoma.

One mining lease from D. S. Chubb and wife to Fred Fulton on Lots 3 and 4 in Section 12 and Lot 3 in Section 13, in Township 35 S., Range 23 East of the Sixth Principal Meridian in Cherokee County, Kansas, and which said lease was thereafter assigned to said W. M. Smith and one J. R. Robeson.

That in pursuance of such arrangement, there was taken in the name of Walter T. Apple, leases, rights, interests and contracts, upon the following described lands, to-wit:

A mining lease from Alex Lewis to W. T. Apple, dated February 6, 1915, on the E. ½ of the S. E. ¼ of Section 34, and the W. ½ of the S. W. ¼ and the S. W. ¼ of the N. W. ¼ of Section 33, Township 29 N., Range 23 East, extending over a period of 10 years.

(This lease covers the undivided interest of Alex Lewis in said real estate.)

One farm lease from Alex Lewis to W. T. Apple, dated February 6, 1913, on the contract of land last above described, which covers a period of three years from date.

One farm lease from Mary Daylight to W. T. Apple, dated September 2, 1914, on the undivided one-third interest in and to the N. ½ of the N. W. ¼ and the S. W. ¼ of the N. W. ¼ of Section 26, Township 29, Range 23 in Ottawa County, Oklahoma.

30 One farm lease from Fannie Goodeagle to W. T. Apple, dated October 7, 1914, on the N. W. ¼ of Section 26, Township 29 N., Range 22 East, and the E. ½ of the N. E. ¼ of Section 27, Township 29 N., Range 22 East of the Indian Meridian in Ottawa County, Oklahoma, for a period of three years from date.

That in pursuance of such arrangement there were taken in the name of Apple and Smith, for the benefit of said parties plaintiff and defendant, leases, rights, interests and contracts, upon the following described lands, to-wit:

One farm lease from Lewis Angel to W. M. Smith and W. T. Apple, dated September 4, 1914, on Lot 2, Section 27, Township 29 N., Range 23, East, Ottawa County, Oklahoma, for a period of three years.

One assignment of farm lease from Major A. Binns, Ada M. Smith and Gertrude M. Binns, executors and heirs at law of Samuel Binns, deceased, to W. T. Apple and W. M. Smith, assigning certain leases therein described as follows:

One lease dated August 22nd, 1914, from W. B. F. Valliere and Vida Z. Valliere, his wife, to Samuel Binns, covering one hundred (100) acres of land in Sections 29 and 32, Township 29, Range 24, in Ottawa County, Oklahoma, and recorded in the office of the Register of Deeds at Miami, Book 33, Page 585.

One lease dated August 22nd, 1914, from Martha F. V. Mason and Paul N. Mason, her husband, to Samuel Binns, covering eighty acres (80) of land in Sections 32 and 33, Township 29, Range 24, in Ottawa County, Oklahoma, for a period of three years, said instrument is recorded in the office of the Register of Deeds at Miami, in Book 33, at Page 586.

One lease dated August 24th, 1914, from Chas. Quapaw Blackhawk to Samuel Binns, covering one hundred fifty (150) acres of land in Section 32, Township 29, Range 24, in Ottawa County, Oklahoma, for a period of two (2) years, said instrument is recorded in the office of the Register of Deeds at Miami, Oklahoma, in Book 33, page 587.

One farm lease from B. F. Imbeau to W. T. Apple and W. M. Smith, dated December 24, 1914, on the N. E. ¼ of the S W. ¼ of Section 31, Township 28 N., Range 25 East, in Ottawa County, Oklahoma, for a period of three years, commencing on January 2, 1915.

One farm property lease from Harry Crawfish to W. T. Apple and W. M. Smith, dated September 5, 1914, on the S. ½ of the N. E. ¼ of Section 12, Township 29 N., Range 23 East, and the S. E. ¼ of S. E. ¼ of the S. E. ¼ of Section 17, Township 29 N., Range 23 E., and the S. E. ¼ of the S. E. ¼ of Section 29 in Township 29 N., Range 23 E., in Ottawa County, Oklahoma, for a term ending September 4, 1917.

One farm lease from M. A. Dardenne Burch to W. T. Apple and W. M. Smith, dated February 17, 1915, on the N. W. ¼ of the N. W. ¼ of Section 33, Township 29 N., Range 24 E., and the E. ½ of the N. E. ¼ of Section 32, Township 29 N., Range 24 E. of the Indian Meridian in Ottawa County, Oklahoma, for a term of three years.

One mining lease from Mary Partis to W. T. Apple and W. M. Smith, J. O. Goodwin and S. B. Apple on the N. W. ¼ and S. W. ¼ of the N. E. ¼ and the N. ½ of the S. W. ¼ and the N. W. ¼ of the S. E. ¼ of Section 23, Township 29 N., Range 23 E., in Ottawa County, Oklahoma, the interests of said leases being held as follows: W. T. Apple, one-sixth, W. M. Smith, one-sixth, J. O. Goodwin, one-third and S. B. Apple one-third.

31 A farm lease between W. T. Apple, guardian for Henry, Clara, Mary, Nora and William Buffalo, to W. T. Apple and W. M. Smith, dated January 1, 1914, on the S. ½ of the N. E. ¼ and the N. ½ of the S. E. ¼ of Section 11, Township 28 N., Range 24 E. of Indian Meridian, and the S. E. ¼ of the N. E. ¼ of Section 12, Township 28 N., Range 24 E. of Indian Meridian in Ottawa County, Oklahoma, for a term of three years.

A mining lease from Hessie May Cousatte Gilmore to W. T. Apple and W. M. Smith, dated February 9, 1915, on the S. ½ of the N. E. ¼ and the N. W. ¼ of the S. E. ¼ all in Section 13, Township 29 N., Range 23 E. of Indian Meridian in Ottawa County, Oklahoma, for a term of 10 years.

A farm lease from Harry Crawfish to W. T. Apple and W. M. Smith, dated December 24, 1914, on the S. ½ of the N. E. ¼ of Section 22, the S. E. ¼ of the S. E. ¼ of Section 17, and the S. E. ¼ of the S. E. ¼ of Section 20, all in Township 29 N., Range 23 E. of Indian Meridian, and the N. E. ¼ of the S. W. ¼ of Section 33 in Township 29 N., Range 24 E. of Indian Meridian, all in Ottawa County, Oklahoma, for a term of three years.

That said leases, rights, interests and contracts were taken from time to time and the terms and conditions thereof were carried out by said plaintiff and defendant by subleasing, prospecting, mining, drilling and developing the same.

That all of said leases, rights, interests, contracts and agreements so taken were taken for the purpose of carrying out said above arrangement and the profits, if any, arising therefrom were to be divided between plaintiff and defendant, share and share alike, and the losses, if any, arising therefrom, to be shared equally between plaintiff and defendant.

That after the development of the tracts of land upon which interests had been taken in the name of Wesley M. Smith, said defendant, Wesley M. Smith, appropriated the same to his own use and benefit and denied the right and interest of plaintiff therein, and appropriated all the profits derived therefrom in said mining venture, although this plaintiff had contributed thereto, and said defendant has received and collected as an individual a considerable amount and sums of money and has invested them in individual enterprises and for his own use and benefit and has withheld from this plaintiff the facts surrounding these various and divers transac-

tions, and by reason thereof with greater certainty and particularity, and that said defendant has assigned and disposed of, without right or authority and without accounting to this plaintiff, the partnership interest in some of the leases, rights and contracts and interests taken, which this plaintiff is unable at this time, by reason of the concealment and withholding of the facts from him by said defendant, to set forth such facts with greater certainty and particularity.

That said defendant has concealed and withheld from this plaintiff with the intent to defraud said plaintiff of his interests and rights in said properties the terms and circumstances of said arrangements which the said defendant had made in his own name, so that at this time, the plaintiff is unable to set forth the facts thereof with any greater certainty and particularity than as herein set forth.

Wherefore, plaintiff prays that the defendant be compelled to disclose any and all leases, contracts, deeds, instruments or agreements of any kind showing rights, title or interest of any
32 kind, to any and all properties acquired by him in pursuance of said joint business, venture and enterprise set forth in this petition, or acquired from funds arising from said business, venture, or enterprise, and that plaintiff be decreed to have an undivided one-half interest in all such properties, rights, interests, contracts, and leases as have been taken in the name of the said Wesley M. Smith. That the arrangement between the parties hereto be dissolved, and that a receiver be appointed, if found necessary. That the defendant be required to account for all proceeds arising from any and all of said business. That said arrangement be closed, and that the rights, title and interests obtained by said parties be sold or divided as in equity and good conscience the court may see fit, and for such other and further relief as may appear just and equitable in the premises.

EDWARD E. SAPP AND
E. B. MORGAN,
Attorneys for Plaintiff.

33 EXHIBIT "B."

In the District Court of Cherokee County, Kansas, Sitting at Galena.

W. T. APPLE, Plaintiff,

vs.

WESLEY M. SMITH, Defendant.

Journal Entry of Judgment.

Now, on this 24th day of December, 1918, comes on for decision and determination the motion for a new trial, heretofore filed and argued, and for judgment in the above entitled action, plaintiff appearing by his attorneys, Edward E. Sapp and E. B. Morgan, and the defendant appearing in person and by his attorneys, A. Scott Thompson and S. C. Westcott; and

The court being fully advised in the premises, does overrule and deny said motion for a new trial and the court finds, adjudges and decrees that there was a joint arrangement of partnership between the plaintiff and defendant, as alleged in the plaintiff's petition and as developed in the evidence herein, as heretofore found by the referee in said case, and further finds that the said defendant is indebted to the said plaintiff in the sum of $55,042.03½, and the court further finds that A. S. Wilson, the referee in said case, is entitled to a fee of $2,000 for his services in said case, to be taxed as costs herein, and that the stenographer's fees in said cause, incurred in the hearing before said referee have already been paid by an agreement between said parties, plaintiff and defendant, and are not to be taxed as costs herein, and that the remainder of said costs in said cause amount to the sum of $—; and the

Court further finds that each of said parties should pay one-half of the costs in said action, the total amount of said costs to be taxed being the sum of $—.

Whereupon, it is considered, ordered, adjudged and decreed by the court herein, that the said plaintiff, W. T. Apple, do have and recover of and from the said defendant, Wesley M. Smith, the said sum of $55,042.03½, together with interest from this date at the rate of six per cent (6%) per annum, and one-half of the costs in said cause, amounting to the sum of $— and it is by the court further considered, ordered, adjudged and decreed that said defendant, Wesley M. Smith, do have and recover of and from the said plaintiff, W. T. Apple, $—, being one-half of the costs in said action.

The Court does further adjudge and decree that the plaintiff and defendant are equal owners as partners of a one-third interest in a mining lease on the N. W. ¼ of the S. W. ¼ of the N. E. ¼, the E. ½ of the S. W. ¼, and the N. W. ¼ of the S. E. ¼ of Section 2, Township 29, North of Range 23, East of the Indian Meridian, in Ottawa County, Oklahoma, containing 120 acres more or less, released to one O. S. Picher, at a ten per cent royalty, being an advance of two per cent royalty; that the plaintiff and defendant are each entitled to a one-sixth interest in said lease, or a one-third interest in the two per cent royalty.

That the plaintiff and defendant are equal owners, as partners, of a lease held in the name of the plaintiff and described as follows: The E. ½ of the S. E. ¼ of Section 34, and the W. ½ of the S. W. ¼ and the S. W. ¼ of the N. W. ¼ of Section 35, Township 29, Range 23 E., in Ottawa County, Oklahoma, this lease being executed by Alex Lewis to W. T. Apple.

That the plaintiff and defendant are equal owners, as partners, of the mining leases, known as the Jack Fish leases *— (1) mining lease from Leander J. Fish to Wesley H. Smith, dated November 2, 1912, on the E. ½ of the N. W. ¼ and the W. ½ of the N. E. ¼ of Section 32, Township 29, Range 23, East of the Indian Meridian, in Ottawa County, Oklahoma; (2) one mining lease from Jack Fish to Wesley M. Smith, dated August 7th, 1914, on the S. W. ¼ of the N. E. ¼ of Section 32, Township 29, Range 23, and

the S. W. ½ of the N. E. ¼ of the same section; and (3) one
35 mining lease from Leander J. Fish and Joseph P. Fish to W. M. Smith, dated January 6, 1913, on the S. E. ¼ of the N. E. ¼ of Section 32, Township 29, Range 23, all in Ottawa County, Oklahoma.

That the plaintiff and defendant are the equal owners, as partners, of an undivided one-half interest in mining leases upon the following: (1) mining lease from Zahn A. Douthat, dated February 4, 1915, to W. M. Smith and W. J. Pottorff, on the S. E. ¼ of the S. W. ¼ and the S. W. ¼ of the S. E. ¼ of the S. E. ¼ of Section 29, Township 29, Range 23 E., of the Indian Meridian in Ottawa County, Oklahoma; and (2) mining lease from Z. A. Douthat and Katherine Douthat, his wife, to W. M. Smith and W. J. Pottorff, dated September 5, 1915, covering the S. E. ¼ of the S. W. ¼ and the S. W. ¼ of the S. E. ¼ of Section 29, Township 29, Range 23, East of the Indian Meridian in Ottawa County, Oklahoma.

That the plaintiff and defendant are the joint owners of a mining lease from John Jones to W. M. Smith, dated June 1, 1913, covering a fourth interest in a leasehold estate, except 5 per cent royalty due Indian land owner on the N. W. ¼ of Section 12, Township 28 N. Range 22, East of the Indian Meridian, except the N. E. ¼ of the S. E. ¼ of the N. W. ¼ of said section.

That the plaintiff and defendant are the equal owners as partners, of one mining lease from Francis Goodeagle and others to W. M. Smith, dated January 18, 1913, covering certain portions of Section 34, Township 29, N. Range 23 East, of the Indian Meridian in Ottawa County, Oklahoma.

The court orders and decrees that the plaintiff and defendant are the equal owners, as partners, of a mining lease from Lizzie Cedar to W. M. Smith, dated April 5th, 1915, on the S. W. ¼ of Section 29, and the S. E. ¼ of the S. E. ¼ of Section 26, and the N. E. ¼ of the N. E. ¼ of Section 30, all in Township 29 N. Range 24 East of the Indian Meridian in Ottawa County, Oklahoma.

And the court further orders, adjudges and decrees that the plaintiff and defendant are equal owners as partners, of an undivided one-half interest in the following mining lease, which was taken in the
name of Fred Fulton and assigned to W. M. Smith and J. R.
36 Robeson, as alleged in said petition; one mining lease from D. S. Chubb and wife to Fred Fulton on Lots 3 and 4 in Section 12, and Lot 3 in Section 13, in Township 35 S. Range 23 East of the 6th P. M., in Cherokee County, Kansas, which said lease was thereafter assigned to said W. M. Smith and one J. R. Robeson.

The court further orders, adjudges and decrees that a receiver be appointed to collect the royalties accruing from said leases, and sell said leases, and that for such purpose the plaintiff and defendant are each to assign to said receiver such leases, so that the same may be sold by said receiver, and that the money arising from such sale be divided equally between the plaintiff and defendant, after first deducting from the interest of the defendant, any sum yet remaining due upon said judgment of $55,042.03½.

It is further ordered, adjudged and decreed that the plaintiff and defendant make an accounting to said receiver, of the amount of money received by the plaintiff and defendant on the above leases since the accounting made before the referee, and the money so received is to be divided equally between the plaintiff and defendant.

Execution is stayed hereunder for forty-five days from the date hereof, pending the giving of a supersedeas bond by the defendant.

It is further ordered and decreed that in the event of an appeal, that the defendant be required to assign the aforesaid leases as required by this decree to a receiver, and in default thereof, on or before the time fixed for staying of execution, to give a good and sufficient bond as required by law in the sum of $10,000.00.

——— ———,
Judge.

37 EXHIBIT "C."

In the District Court of Cherokee County, Kansas, Sitting at Galena.

W. T. APPLE, Plaintiff,

vs.

W. M. SMITH, Defendant.

Supersedeas Bond.

Know all men by these presents: That W. M. Smith, as principal, and J. E. Pottorff and G. L. Coleman, as sureties, are held and firmly bound unto the plaintiff in the above entitled cause, W. T. Apple, in the sum of One Hundred and Twenty-three Thousand Dollars ($123,000.00), to the payment of which well and truly to be made, by these presents, we firmly bind ourselves, our heirs, executors, administrators, successors and assigns.

Dated this 15th day of February, 1919.

The condition of the above obligation is such, that whereas, the plaintiff in the above entitled cause in the above entitled court obtained a judgment on the 24th day of December, 1918, against the above named defendant and appellant, W. M. Smith, in the sum of Fifty five Thousand and Forty-two dollars and three and one-half cents principal and the further sum of approximately twelve hundred and fifty dollars costs; and,

Whereas, a further judgment was rendered directing the said defendant and appellant to make certain assignments of leasehold interests for mining purposes all asset out in said judgment, and to do an- perform certain other things as set out in said judgment; and,

Whereas, the court fixed the amount of the bond for a stay of the judgment as a whole to be Ten Thousand Dollars in addition to the amount of the money judgment as required by law; and,

Whereas, said defendant and appellant, W. M. Smith, intends to appeal as a whole from the judgment of said District Court to the Supreme Court of Kansas,

Now, therefore, if the above bounden, W. M. Smith, shall pay said plaintiff, W. T. Apple, the condemnation money and costs as herein set forth, and shall perform and comply with all of the terms and conditions of said judgment, in said *said* judgment shall be affirmed in whole or in part, then this bond shall be void; otherwise to remain in full force and effect.

W. M. SMITH,
Principal.
J. E. POTTORFF,
G. L. COLEMAN,
Sureties.

O. K.
SAPP.

Approved by me this 15th day of February, 1919.

[Seal District Court.]

FRED SIMKIN,
Dist. Clerk.
By BERTHA MOSS,
Deputy.

38 EXHIBIT "D."

Page 227.

Judicial Day July 20, 1920.

No. 22362.

STATE OF KANSAS, *ss:*

Supreme Court.

The State of Kansas to the District Court within and for the County of Cherokee in the State of Kansas, Greeting:

Whereas, In a certain civil action lately pending before you, wherein W. T. Apple was plaintiff and Wesley M. Smith was defendant a judgement was rendered by you against the said defendant from which judgment said defendant prosecuted an appeal in the Supreme Court within and for the State of Kansas.

And Whereas at the December session of the July Term of said Supreme Court, A. D. 1919, on consideration of the said appeal it was ordered and adjudged by the said Supreme Court that the judgment of the District Court be affirmed. And Whereas at the May Session of the January Term of said Supreme Court 1920, on reconsideration of said appeal on a re-hearing granted it was by the court ordered and adjudged that the former judgment of affirmance be modified as set forth in the Court's second written opinion, a copy of which is herewith transmitted.

You are therefore commanded that without delay you cause execution to be had of the said judgment of the Supreme Court, according to law.

Witness my hand and the seal of said Supreme Court, affixed thereto, at my office, in the City of Topeka, on the 8th day of May, A. D. 1920.

[SEAL.]

D. A. VALENTINE,
Clerk of the Supreme Court.

No. 22362. W. T. Apple vs. Wesley M. Smith. Mandate from Supreme Court. State of Kansas, Cherokee County, ss. Received and filed July 20, 1920. Fred Simkin, Clerk of District Court, by Zoe Ellis, Deputy.

39

EXHIBIT "E."

229.

Journal District Court, Cherokee County, Kansas, Sitting at Galena.

March Term, A. D. 1920, 20th Judicial Day, August 9, 1920.

W. T. APPLE, Plaintiff,

vs.

WESLEY M. SMITH, Defendant.

Modification of Journal Entry of Judgment.

Now on this 9th day of August the same being a regular adjourned day of the March, 1920 term of said court, this cause comes on for hearing on the oral motion of the plaintiff to enforce the Mandate of the Supreme Court now on file herein.

Plaintiff appears in person and by Edward E. Sapp and E. B. Morgan his attorneys and the defendant appears not either in person or by attorney.

And the Court having examined the Mandate and opinions of the Supreme Court in said cause and being well advised in the premises does consider, order and adjudge as follows:

I.

That the original journal entry of judgment rendered herein on the 20th day of December, 1918, be and the same is hereby modified so as to conform to the Mandate of said Supreme Court, and the plaintiff and defendant are hereby ordered and directed forthwith to execute and deliver to the clerk of this Court proper assignments duly acknowledged of the various leases and mining rights held in their respective individual names as found by the report of the referee, and as contained in the original judgment herein the same to be assigned to the partnership firm of Apple & Smith, a co-partnership composed of W. T. Apple and Wesley M. Smith.

II.

And it is further considered, ordered and adjudged that said cause be and the same is hereby again referred to the Hon. A. S. Wilson as referee to take an accounting of and report to the Court the amount of royalties received by the respective parties plaintiff & defendant, since the items accounted for to the referee on the former accounting and the said referee is hereby directed to report his findings of fact and conclusion of law in reference thereto at the opening of the September 1920, term of the Court; said referee to give due notice to the respective parties or their attorneys of the time and place of taking said further accounting.

40 It is further considered ordered and adjudged that in case the said parties plaintiff and defendant or either of them do not assign to the firm of Apple & Smith the interests so held by them respectively in the respective leases and mining rights, as found in the said report of the referee and the original decree of the court herein, prior to the taking of the said accounting by the referee, the said referee shall take an accounting of the value of the mining leases and mining rights so held by said parties or either of them, and which they have failed or refused to assign in compliance with the judgment and decree of this Court and include in his report his findings and conclusions in reference thereto.

F. W. BOSS,
Judge.

41 EXHIBIT "F."

STATE OF OKLAHOMA,
County of Ottawa, ss:

In the District Court of Ottawa County, Oklahoma.

No. 4104.

WESLEY M. SMITH, Plaintiff,

vs.

W. T. APPLE, Defendant.

Petition.

Plaintiff for his cause of action states:

1st. That the plaintiff is a resident and citizen of the City of Miami, Ottawa County, Oklahoma, and his Post office address is Miami, Ottawa County, Oklahoma, and the defendant is a resident and citizen of Baxter Springs, in Cherokee County, Kansas, and his Post Office address is Baxter Springs, Cherokee County, Kansas.

2nd. Plaintiff states that he is the owner of an interest and estate in two hundred acres of land, situate, lying and being in Ottawa County, Oklahoma, the description of which is as follows:

The East One-half (E. ½) of the Northwest Quarter (N. W. ¼) and the West One-half (W. ½) of the Northeast Quarter (N. E. ¼) and the Southeast Quarter (S. E. ¼) of the Northeast Quarter (N. E. ¼) of Section Thirty-two (32) Township Twenty-nine (29), Range Twenty-Three (23) East of the Indian Meridian;

That he is now in the possess of all of said described lands for mining purposes, and has been so in possession of the lands for more than four years last past, and has been so thereon carrying on mining operations for all of said period.

Plaintiff avers that all of said land was, by patent from the United States duly conveyed to one Leander J. Fish, a Quapaw Indian of the Quapaw Indian Tribe of Ottawa County, Oklahoma, on the — day of — 19—; that under the acts of the Congress of the United States as well as by the recital in said patent, the said Leander J. Fish and his Quapaw Indian Heirs were prohibited from alienating the said lands for a period of twenty-five years from the date of said patent, but that by the acts of Congress of June 7, 1897, 28 Stat. L. the said Leander J. Fish and his said Indian heirs were authorized to lease the said lands for a term of ten years for mining purposes.

3rd. Plaintiff states that the said Leander J. Fish had one son named Joseph P. Fish, who was his only child, and that said Leander J. Fish deceased on the 20th day of November, 1914, leaving as his only heir at law the said Joseph P. Fish.

4th. Plaintiff avers that his right, title, interest and estate in and to said land was acquired in the following manner, to-wit:

The said Leander J. Fish being the owner of said lands as aforesaid and being authorized to lease the same for mining purposes as aforesaid, on the 4th day of November, 1912, duly executed to and delivered to the plaintiff a mining lease, by the terms of which the said Leander J. Fish did lease, demise and let to the plaintiff for mining purposes and for a term of ten years from the date thereof, and at a royalty of 5% based on the gross amount of lead and zinc ore mined and sold therefrom, all of the East one-half (E. ½) of the Northwest Quarter (N. W. ¼); and the West one-half (W. ½) of the Northeast Quarter (N. E. ¼) of Section Thirty-two (32), Township Twenty-nine (29), Range Twenty-three (23) East of the Indian Meridian in Ottawa County, Oklahoma, and which mining lease was by the plaintiff duly filed for record in the office of the recorder of Deeds for Ottawa County, on the — day of ——, 1912, and recorded in Book 31, at page 695.

A copy of the said mining lease is attached to this petition and marked Exhibit "A," and made a part hereof.

5th. Plaintiff avers that the said Leander J. Fish joined by his son Joseph P. Fish as lessors and grantors, on the 6th day of January, 1913, by virtue of and under the aforesaid Acts of Congress, did lease, demise, and let to the plaintiff for mining purposes and for a term of ten years and at a royalty of Five Per Cent based on

the gross amount of lead and zinc ores mined and sold from said described land, the following further part of said Two Hundred Acres of land, to-wit:

All of the Southeast Quarter (S. E. ¼) of the Northeast Quarter (N. E. ¼) of Section Thirty-two (32), Township Twenty-nine (29), Range Twenty-three, East of the Indian Meridian in Ottawa County, Oklahoma;

which mining lease the plaintiff duly filed for record in the Office of the Recorder of Deeds for Ottawa County, Oklahoma, and the same was duly recorded in the Lease Record Book 34 at page 77; a copy of said lease is hereto attached and marked Exhibit "B," and made a part hereof.

6th. Plaintiff avers that on the 7th day of August, 1914, the said Leander J. Fish, as lessor and grantor, executed and delivered to the plaintiff a mining lease by the terms of which the said Leander J. Fish, by virtue of the acts of Congress aforesaid, did lease, demise and let to the plaintiff for mining purposes and for a term of ten years at a royalty of five per cent based on the gross amount of the lead and zinc ore mined and sold from the described lands, all of the northwest Quarter (N. W. ¼) of the Northeast Quarter (N. E. ¼) of Section Thirty-two (32), Township Twenty-nine (29), Range Twenty-three (23), and the Southwest Quarter (S. W. ¼) of the Northeast Quarter (N. E. ¼) of the same Section in Ottawa County, Oklahoma, and which mining lease the plaintiff filed for record in the office of the Recorder of Deeds for Ottawa County, Oklahoma, on the — day of ——, 1914, and the same was recorded in Lease Record Book 38, at Page 341. A copy of said lease is hereto attached and marked Exhibit "C," and made a part hereof.

43 7th. Plaintiff avers that he entered upon said described lands under said leases at the respective dates thereof, and has mined and carried on mining operations on said land under said leases from the dates thereof up to the present time, and that he is in possession of said tracts of land mining and carrying on mining operations pursuant to the terms and conditions of said leases, and by virtue of said leases is the owner and holder of a freehold interest in all of said lands for mining purposes and is the sole and exclusive owner and holder of all the estates, rights and interest in and to said real estate granted by the terms of said leases and each thereof, and that the owners of the fee in said land recognized and confirmed all of the mining rights, title and interest, for mining purposes in and to all said tracts of land to be in the plaintiff and the plaintiff has from the respective dates of said leases mined said lands thereunder and has paid and is now paying the royalties accruing under the said leases to the grantors and lessors and the owners of the fee title to said tracts of land.

8th. Plaintiff avers that said leases and all the rights and benefits granted thereby constitute immovable property, and real estate as under the laws of Oklahoma; and, that the defendant claims and

constantly asserts some right, title, interest and estate adverse to the plaintiff. And that such claim constitutes a claim upon the plaintiff's title and right to the use and benefit of the aforesaid two hundred acres of land.

Plaintiff states that the defendant claims and asserts that the plaintiff obtained the said leases, and each thereof, for the joint use and benefit of the plaintiff and defendant, and that he (the defendant) is the owner of an undivided one-half of all the interest, estate, right, title and benefits which were granted to the plaintiff by the language, terms and conditions of the said leases and each thereof; and that said defendant is now demanding that the plaintiff convey and assign to him all of an undivided one-half interest in and to plaintiff's interest and estate in and to the aforesaid two hundred acres of land, so as aforesaid granted to the plaintiff by the mining leases hereinbefore described and attached to this petition (by copy) as Exhibits "A," "B" and "C."

That the defendant claims and asserts that the plaintiff paid one-half of the consideration for said leases and each thereof, for the defendant; and that one-half of the amounts spent in developing mineral on the lands described in said leases and each thereof, was so expended by plaintiff for defendant; and claims and asserts that one-half of all the right, estate, title and interest granted to the plaintiff by the demises and leases aforesaid (and each thereof) is held by the plaintiff in trust for the defendant; and, that the defendant now demands of and from the plaintiff an undivided one-half interest and estate in all the said property rights, and all the rights, titles and estate acquired by the plaintiff under the aforesaid leases and each thereof, and is threatening to enjoin the plaintiff from receiving the benefits and emoluments accruing to the plaintiff under the said leases, and is threatening to notify plaintiff's sublessee not to pay plaintiff the royalties accruing under sublease of said lands, and is threatening to enjoin plaintiff's sub-lea*s*e-s from paying the royalties accruing to plaintiff from his sub-leases on said lands and from paying the same to plaintiff.

9th. Plaintiff avers that all of said claims of right or title by the defendant, and each thereof, are fictitious, false, and untrue and are fraudulently made by the defendant for the purpose of defrauding the plaintiff, and with fraudulent, wicked and false purpose of obtaining rights and interest in plaintiff's aforesaid property 53½ right, to which the defendant has no just claim either in law or equity; and, plaintiff avers that defendant has in fact no just claim of any right of any character in or to plaintiff's said property and ought to be excluded from making any such false claim.

Wherefore, and the premises considered, plaintiff prays that defendant be required to set up in his answer to the plaintiff's petition whatever right, title, interest or estate he claims in the interest, estate, right and title which plaintiff acquired in the two hundred acres of land described in plaintiff's petition by means of the leases

described and attached (by copy) as exhibits to this petition, and set up in his answer the manner or means by which he claims undivided interest in plaintiff's said property and property right; that the Court determine and adjudge that the claims of the defendant charged in this petition and all claims which defendant may herein plead, are fictitious, void and of no effect; that the Court by its judgment and decree exclude the defendant from any right, title or interest in each, any, every and all rights which the plaintiff has or may hereafter acquire to any interest in the plaintiff's said property right, and adjudge that the defendant be enjoined from making or asserting any claim of or to the rights and estate acquired by plaintiff under the leases set out in plaintiff's petition, and find and adjudge that all claims made by the defendant are void and of no effect; and adjudge the quieting of the plaintiff's rights, title and interest against the defendant; and that plaintiff have judgment for his costs herein expended and any and all other equitable relief to which plaintiff may be entitled under the allegations of his petition and the facts proven at the trial.

A. SCOTT THOMPSON AND
HIRAM W. CURREY,
Attorneys for Plaintiff.

STATE OF OKLAHOMA,
County of Ottawa, ss:

Wesley M. Smith, the plaintiff above named, upon his oath states that he has read the above and foregoing petition and knows the contents thereof, and that the facts stated therein are true.

WESLEY M. SMITH.

Subscribed and sworn to before me this 29th day of May, 1920.
[SEAL.] KARL N. SWEEM,
Clerk.

44 EXHIBIT "G."

In the District Court of Ottawa County, Oklahoma.

No. 4104.

STATE OF OKLAHOMA,
County of Ottawa, ss:

WESLEY M. SMITH, Plaintiff,

vs.

WALTER T. APPLE, Defendant.

Answer.

Comes now the defendant, Walter T. Apple, and for answer to plaintiff's petition herein, says that he denies that the plaintiff is a resident and citizen of the City of Miami, County of Ottawa, State of

Oklahoma, and admits that the defendant is a resident and citizen of Baxter Springs, in the County of Cherokee and State of Kansas;

Defendant denies that plaintiff is the owner of an interest and estate as alleged in his petition to the land described therein;

Defendant admits that Leander J. Fish was a Quapaw Indian, and that said land was under restriction for a period of twenty-five years from the date of the patent, and is informed and believes that said period of restriction does not expire until some time in the year 1921.

Defendant admits that by Act of Congress of June 1897, that said Leander J. Fish was authorized and empowered to make a lease upon the land described in plaintiff's petition, for mining purposes, and admits that Joseph Fish was the only living child of Leander J. Fish, and that said Leander J. Fish died on or about the 20th day of November, 1914.

Defendant admits that the leases set forth in said petition were at the time and for the term set forth in plaintiff's petition, and that the same were recorded as therein set forth and denies each and every other material allegation in said petition, and denies that the leases convey the character of title set forth in plaintiff's petition, and further answering, alleges the facts to be:

That for several years last past, the plaintiff, Wesley M. Smith, was a resident and citizen of the State of Kansas, residing at Baxter Springs, Cherokee County, Kansas; that the leases in question were taken by said Wesley M. Smith for the use and benefit of himself and this defendant, Walter T. Apple; that on the 12th day of July, 1916, an action was brought wherein the plaintiff was W. T. Apple, the present defendant in this action, and the defendant was Wesley M. Smith, the present plaintiff in this action, in the District Court of Cherokee County, Kansas, a court having full power, authority and jurisdiction in said action; that the subject matter of said action was the subject matter in the present controversy; that the persons of said action were the same persons that are in the present action;

That the present plaintiff, Wesley M. Smith, appeared
45 and answered in said action and said court, having full power, authority and jurisdiction of the subject matter and the persons in said action, proceeded to try said case, and a judgment and decree was rendered therein, a copy of which judgment and decree is hereunto attached, marked Exhibit "A" and made a part hereof;

That said Wesley M. Smith appealed said action to the Supreme Court of the State of Kansas, and there appeared in person and by his attorneys, and presented the questions for determination, the said Court having at said time full power, authority and jurisdiction to determine the questions therein involved and had at said time the jurisdiction over the persons of the plaintiff and the defendant, and each of them, and the said court affirmed and modified said opinion, and thereupon the District Court of Cherokee County, State of Kansas, having jurisdiction of the persons of said plaintiff and defendant and full authority, power and jurisdiction in said action, did modify said decree theretofore rendered, and marked Exhibit "A"

herein, a copy of which modification is hereunto attached, marked Exhibit "B" and made a part hereof.

Defendant further alleges that said Wesley M. Smith, the Plaintiff in this action, for the purpose of cheating and defrauding said Walter T. Apple, and for the purpose of obstructing the due process of the court, under whose jurisdiction he resided, has attempted to remove his residence and citizenship from the State of Kansas to the State of Oklahoma, and well knowing that said questions had been fully determined by a court of proper jurisdiction and proper power, brought said above entitled action, and for no other purpose.

Wherefore, Defendant prays that said action may be dismissed and that he recover is costs herein.

EDWARD E. SAPP,
E. B. MORGAN,
Attorneys for Defendant.

46 EXHIBIT "H."

STATE OF OKLAHOMA,
County of Ottawa, ss:

In the District Court.

No. 4104.

WESLEY M. SMITH, Plaintiff,

vs.

WALTER T. APPLE, Defendant.

Disclaimer.

Now, on this 8th day of June, 1921, comes the defendant, Walter T. Apple, and disclaims that he now has or claims any interest in the leases set forth in plaintiff's petition.

EDWARD E. SAPP,
Attorney for Defendant.

Endorsements: No. 4104. Wesley M. Smith, Plaintiff vs. Walter T. Apple, Defendant. Disclaimer. Filed in open court, State of Okla., County of Ottawa, Jun. 8, 1921. Geo. M. Henderson, County Clerk, by Ethel McGres, Deputy. Edward E. Sapp, Att'y for Defendant.

47 EXHIBIT "I."

STATE OF OKLAHOMA,
County of Ottawa, ss:

In the District Court of Ottawa County, Oklahoma.

No. 4103.

WESLEY M. SMITH, Plaintiff,

vs.

WALTER T. APPLE, Defendant.

Journal Entry.

Now on this 13th day of June, 1921, the same being a day of the adjourned regular May 1921 term of the above styled court the above cause having been regularly assigned for trial on this date and coming on to be heard, the plaintiff, Wesley M. Smith, being present in person and by his attorney, A. Scott Thompson, and the defendant, Walter T. Apple, appearing not and being three times called in open court said defendant, Walter T. Apple, failed to appear; the trial proceeded by offering of evidence in behalf of the plaintiff and after hearing said testimony the court from the evidence offered herein and from the pleadings and appearances filed herein finds:

First. That the defendant, Walter T. Apple, was duly served with summons in this cause and that he thereafter appeared in this court and filed his answer to the petition filed herein by plaintiff, setting forth in said answer that in a proceeding instituted in the district court of Cherokee County, Kansas, theretofore by said Walter T. Apple against the plaintiff herein, Wesley M. Smith said court had found and decree that the said Walter T. Apple, Defendant herein, was the owner of an undivided one-half interest in and to the mining rights upon the lands involved in this suit as disclosed by the mining leases taken in the name of the plaintiff herein; that the plaintiff herein thereupon filed a demurrer to said answer and same was duly argued to this court and briefed by respective counsel and this court took said demurrer under advisement and that said defendant, Walter T. Apple, before a ruling was made upon said demurrer and on June 9, 1921, did file in this court and in this cause a written disclaimer of any claim of ownership in and to the mining rights or leases held by the plaintiff herein upon the lands described in said plaintiff's petition.

Second. That the said plaintiff, Wesley M. Smith, is the sole owner of an interest and estate in and to the following described lands located in Ottawa County, Oklahoma, to wit: The East Half of the Northwest Quarter and the West Half of the Northeast Quarter and the Southeast Quarter of the Northeast Quarter, all in Section

32 in Township 29 North of Range 23 East of Indian Meridian; that the interest of said plaintiff in and to said lands is evidenced by certain mining leases heretofore executed by the owner of the fee simple title of said premises, Leander J. Fish, and that said plaintiff herein entered into possession of said lands upon the execution of said leases and now is, and has ever since such entry been, in possession of said lands and mining same on the terms of his said mining leases, said mining leases being referred to as follows: One dated November 4, 1912 and recorded in the office of the County Clerk of Ottawa County, Oklahoma, in Book 31 at Page 693; one dated January 6, 1913, and recorded in the same office in Book 34 at
48 Page 77 and 78, and one dated August 7, 1914, and recorded in said office in Book 38 at Page 341.

Third. That the defendant, Walter T. Apple, prior to June 9, 1921, claimed an interest in said mining rights adverse to this plaintiff and that such claim was a cloud upon this plaintiff's title in and to said premises; that said defendant claimed that the plaintiff herein, Wesley M. Smith, obtained said leases for the joint use and benefit of the plaintiff herein and said defendant, Walter T. Apple; that he was not in fact the owner of an undivided one-half interest in and to said rights granted heretofore referred to; that said defendant claimed and asserted that the plaintiff, Wesley M. Smith, had paid a cash consideration for said mining leases for and on behalf of said defendant and that moneys had been expended by said plaintiff, Wesley M. Smith, in the development of said property on the terms of those leases for and on behalf of said defendant and that said plaintiff held said leases in trust for himself and this defendant, Walter T. Apple. But the court finds that the claim of said Walter T. Apple that moneys were expended by plaintiff for him in the securing of said leases and the development of said property is not true and further finds that said leases were taken for the use and benefit only of the plaintiff herein and were not taken in trust for said defendant, Walter T. Apple, and further finds that the said defendant, Walter T. Apple, never had any interest in said leases either in law or equity.

It is therefore ordered, adjudged and decreed:

That the title and possession of said plaintiff in the said premises above described under his mining leases above referred to be, and the same is hereby, forever settled and quieted in the plaintiff as against all claims or demands by the said defendant and those claiming or to claim under him and that any claim heretofore made by said defendant as to an interest in said premises or the mining rights therein is hereby cancelled and decreed void.

It is further ordered, adjudged and decreed that the said defendant, Walter T. Apple, and those claiming through, by or under him be, and they are hereby, perpetually enjoined and forbidden to claim any right, title, interest or estate in or to said premises arising by or through said mining leases or either of them hostile or adverse to the possession and title of the plaintiff herein and said defendant and

those claiming under him are perpetually enjoined and forbidden from commencing any suit to disturb the said plaintiff in his possession and title to said premises, from setting up or asserting any claim or defense adverse to the title of plaintiff herein and from in any manner disturbing plaintiff in his peaceable and quiet possession and enjoyment of said premises.

It is further adjudged that plaintiff have and recover their costs from the defendant incurred prior to June 9, 1921, herein.

S. C. FULLERTON,
Judge.

Endorsements: No. 4103. Wesley M. Smith vs. Walter T. Apple. Journal Entry. Filed in open court, State of Okla., County of Ottawa, Jun. 14, 1921. Geo. M. Henderson, Court Clerk, by Ethel McGrew, Deputy. Civil J. 8 Page 1-2.

STATE OF OKLAHOMA,
County of Ottawa, ss:

I, George M. Henderson, Court Clerk of the above County and State do hereby certify that as such officer I have custody of and control over all the records and files of the District Court of said County and State; that I am the duly elected, qualified and acting Court Clerk of said County and State; that the above and foregoing consisting of:

Petition, Praecipe for Summons, Summons, Return on Summons, Motion for Extension of time to Answer, Answer, Special Demurrer, Disclaimer, Journal Entry of Judgment,

is a true and correct copy of the original of each on file duly entered and recorded in cause No. 4103 on docket of said court, the style being Wesley M. Smith, Plaintiff, vs. Walter T. Apple, Defendant. I further certify that the defendant, Walter T. Apple, filed no motion for new trial and has taken no steps to appeal from the judgment in said cause.

In witness whereof I have hereunto set my hand as such Court Clerk at my office in Miami, Ottawa County, Oklahoma, this 5th day of September, 1921, and have affixed the seal of said court thereto.

[SEAL.]

GEORGE M. HENDERSON,
Court Clerk.

STATE OF OLAHOMA,
County of Ottawa, ss:

I, S. C. Fullerton, Certify that I am the Judge of the District Court sitting in and for Ottawa County, Oklahoma, and do hereby certify that George M. Henderson is the duly elected, qualified and acting Court Clerk of said County and as such officer is the Clerk of the District Court of said County and State and has custody of and

control over all the records of said court; that I am familiar with the signature of said George M. Henderson and the above signature is genuine and is the signature of George M. Henderson and the attestation above is in due form.

In witness whereof I have hereunto set my hand this 5th day of September, 1921, as Judge aforesaid.

S. C. FULLERTON,
Judge of District Court in and for Ottawa County, Oklahoma.

50 EXHIBIT "F-1."

STATE OF OKLAHOMA,
County of Ottawa, ss:

In the District Court.

WESLEY M. SMITH and J. E. POTTORFF, Plaintiffs,

vs.

WALTER T. APPLE, Defendant.

Petition.

Plaintiffs for their cause of action state:

1st. That the plaintiffs are residents and citizens of the city of Miami, Ottawa County, Oklahoma, and their Post Office address is Miami, Ottawa County, Oklahoma, and the defendant is a citizen and resident of Baxter Springs, in Cherokee County, Kansas, and his Post Office address is Baxter Springs, Cherokee County, Kansas.

2nd. Plaintiffs state that they are the owners of a leasehold interest and estate for mining purposes in the following described real estate lying, being and situate in the County of Ottawa, in the State of Oklahoma, to-wit:

The Southeast Quarter (S. E. ¼) of the Southwest Quarter (S. W. ¼) and the Southwest Quarter (S. W. ¼) of the Southeast Quarter (S. E. ¼) of Section Twenty-nine (29), Township Twenty-nine (29), Range Twenty-three (23), East of the Indian Meridian.

Plaintiffs state that they are now and have been for more than four years last past, in the exclusive possession of said described lands and continuously mining and carrying on mining operations thereon.

3rd. Plaintiff's state that at and prior to the dates of the mining leases hereinafter described the said land was, and still is owned in fee by Zahn A. Douthat.

4th. Plaintiffs state that they acquired their said interest and estate in the said land in the following manner and by the following transactions, viz: on the 4th day of February, 1915, the said Zahn A. Douthat executed and delivered to these plaintiffs a mining lease

by the terms of which the said Zahn A. Douthat did lease and demise to the plaintiffs for mining purposes, at a royalty of seven and one-half per cent (7½%) based on the amount of ore to be mined and sold from said lands, and for a term of ten years from date, all of the Southeast Quarter (S. E. ¼) of the Southwest Quarter (S. W. ¼) and the Southwest Quarter (S. W. ¼) of the Southeast Quarter (S. E. ¼), of Section Twenty-nine (29), Township Twenty-nine (29), Range Twenty-three (23) East of the Indian Meridian, in Ottawa County, Oklahoma, which lease was duly recorded in the office of the Recorder of Deeds for Ottawa County, Oklahoma, in Book 42, at page 180; and that on the 8th day of September, 1915, the said Zahn A. Douthat and his wife, Katherine Douthat, executed and delivered to the plaintiffs a mining lease by the terms of which they did lease and demise to the plaintiffs for a term of ten years from the 4th day of February, 1915, and at a royalty of Seven and one-half per cent (7½%) based on the gross amount of lead and zinc ores to be mined and sold from said lands, all of the Southeast Quarter (S. E. ¼) of the Southwest Quarter (S. W. ¼) and the Southwest Quarter (S. W. ¼) of the Southeast Quarter (S. E. ¼) of Section Twenty-nine (29) Township Twenty-nine (29), Range Twenty-three (23) East of the Indian Meridian in Ottawa County, Oklahoma; that mining lease is duly recorded in the office of the Recorder of Deeds of Ottawa County, Oklahoma, in Book 46, at page 10. Copies of the said mining leases are attached to this petition and marked Exhibits "A" and "B," and made a part of this petition.

5th. Plaintiffs aver that they entered upon said described lands under said leases at the respective dates thereof, and have mined and carried on mining operations on said lands under said leases from the dates thereof up to the present time, and that they are in possession of said tract of land mining and carrying on mining operations pursuant to the terms and conditions of said leases, and by virtue of said leases are the owners and holders of a freehold interest in all of said lands for mining purposes and are the sole and exclusive owners and holders of all the estates, rights and interest in and to said real estate granted by the terms of said leases and each thereof, and that the owners of the fee in said land have recognized and confirmed all of the mining rights, title and interest, for mining purposes in and to all said tracts of land to be in the plaintiffs and the plaintiffs have from the respective dates of said leases mined said lands thereunder and have paid and are now paying the royalties accruing under the said leases to the grantors and lessors and the owners of the fee title to said tracts of land.

6th. Plaintiffs aver that said leases and all the rights and benefits granted thereby constitute immovable property, and real estate under the laws of Oklahoma; and, that the defendant claims and constantly asserts some right, title, interest and estate adverse to the plaintiffs. And that such claim constitutes a cloud upon the plaintiffs' title and right to the use and benefit of the aforesaid tracts of land.

Plaintiffs state that the defendant claims and asserts that the

plaintiffs obtained the said leases, and each thereof, for the joint use and benefit of the plaintiffs and defendant, and that he (the defendant) is the owner of an undivided one-half of all the interest, estate, right, title and benefits which were granted to the plaintiffs by the language, terms and conditions of the said leases and each thereof; and that said defendant is now demanding that the plaintiffs convey and assign to him all of an undivided one-half interest in and to plaintiffs' interest and estate in the aforesaid tracts of land, so as aforesaid granted to the plaintiffs by the mining leases hereinbefore described and attached to this petition (by copy) as Exhibits "A" and "B."

52 That the defendant claims and asserts that the plaintiffs paid one-half of the consideration for said leases and each thereof, for the defendant; and that one-half of the amounts spent in developing mineral on the lands described in said leases and each thereof, was so expended by plaintiffs for defendant; and claims and asserts that one-half of all the right, estate, title and interest granted to the plaintiffs by the demises and leases aforesaid (and each thereof) are held by the plaintiffs in trust for the defendant; and, that the defendant now demands of and from the plaintiffs an undivided one-half interest and estate in all the said property rights, and all the rights, titles and estates acquired by the plaintiffs under the aforesaid leases and each thereof, and is threatening to enjoin the plaintiffs from receiving the benefits and emoluments accruing to the plaintiffs under the said leases, and is threatening to notify plaintiffs' sub-lessees not to pay plaintiffs the royalties accruing under sub-leases of said lands, and is threatening to enjoin plaintiffs' sub-lessees from paying the royalties accruing to plaintiffs from their sub-leases on said lands and from paying the same to plaintiffs.

7th. Plaintiffs aver that all of said claims of right or title by the defendant, and each thereof, are fictitious, false and untrue and are fraudulently made by the defendant for the purpose of defrauding the plaintiffs, and with fraudulent, wicked and false purpose of obtaining rights and interest in plaintiffs' aforesaid property right, to which the defendant has no just claim either in law or in equity; and, plaintiffs aver that defendant has in fact no just claim of any right of any character in or to plaintiffs' property and ought to be excluded from making any such false claim.

Wherefore, and the premises considered, plaintiffs pray that defendant be required to set up in his answer to the plaintiffs' petition whatever right, title, interest or estate he claims in the interest, estate, right and title which plaintiffs acquired in the tracts of land described in plaintiffs' petition by means of the leases described and attached (by copy) as Exhibits to this petition, and set up in his answer the manner or means by which he claims an undivided interest in plaintiffs' said property and property right; that the Court determine and adjudge that the claims of the defendant charged in this petition and all claims which defendant may herein plead, are fictitious, void and of no effect; that the Court by its judgment and decree exclude the defendant from any right, title or inter-

est in each, any, every and all rights which the plaintiffs have or may hereafter acquire to any interest in the plaintiffs' said property right, and adjudge that the defendant be enjoined from making or asserting any claim of or to the rights and estates acquired by plaintiffs under the leases set out in plaintiffs' petition, and find and adjudge that all claims made by the defendant are void and of no effect; and adjudge the quieting of the plaintiffs' rights, title and interest against the defendant; and that plaintiff have judgment for his costs herein expended and any and all other equitable relief to which plaintiffs may be entitled under the allegations of their petition and the facts proven at the trial.

A. SCOTT THOMPSON AND
HIRAM W. CURRY,
Attorneys for Plaintiffs.

33 STATE OF OKLAHOMA,
County of Ottawa, ss:

Wesley M. Smith, one of the plaintiffs above named, upon his oath, states that he has read the above and foregoing petition and knows the contents thereof, and that the facts stated therein are true.

WESLEY M. SMITH.

Subscribed and sworn to before me this 29th day of May, 1920.

KARL N. SWEEM,
Clerk.

34 EXHIBIT "G-1."

STATE OF OKLAHOMA,
County of Ottawa, ss:

In the District Court.

No. 4103.

WESLEY M. SMITH and J. E. POTTORFF, Plaintiffs,

vs.

WALTER T. APPLE, Defendant.

Answer.

Comes now the defendant and for his answer to plaintiffs' petition says that he admits that the Plaintiff, J. E. Pottorff, is a citizen and resident of, and that his post office address is, Miami, Ottawa County, Oklahoma, and that the defendant is a resident and citizen of Baxter Springs, Kansas, but denies that plaintiffs are the Owners, in the manner described and set up in said petition, of the leases therein described, and denies that such leases convey the character of title set forth in plaintiffs' petition, and every other material allegation

contained in said plaintiffs' petition, but alleges and states the facts to be:

That on the 20th day of September, 1913, the plaintiff, Wesley M. Smith, acting for and on behalf of himself and the defendant herein, W. T. Apple, obtained a contract for a lease from Zahn A. Douthat and Katerine Douthat, for the land described in said petition, at a royalty of seven and one-half per cent (7½%), and that said plaintiff and defendant took possession of said property under said contract for a lease, and on or before October 20th, 1913, contracted with the plaintiff, J. E. Pottorff, that he should have a one-half interest in said lease upon said land, and that said Pottorff did drill said land and that said contract for a lease ripened into the leases which are described in the plaintiffs' petition;

Defendant admits that said J. E. Pottorff is entitled to an undivided one-half interest in said leases.

Defendant further answering says that said plaintiff, Wesley M. Smith has been and was until very recently, a citizen and resident of Baxter Springs, in the County of Cherokee, State of Kansas, and subject in all actions, to the jurisdiction of the District Court of the Eleventh Judicial District, of Cherokee County, Kansas; that all of the questions set forth in this case, between the plaintiff, Wesley M. Smith, and this defendant, Walter T. Apple, were litigated and determined in an action pending in the District Court of Cherokee County, State of Kansas, said court having full original jurisdiction of the subject matter and of the person of the said plaintiff, Wesley M. Smith, and that after a full and fair hearing and with full power to act, said court did on the 24th day of December, 1918, determine each and every question involved in this case, touching the rights of the parties in the leases described in the plaintiffs' petition:

55 That said plaintiff, Wesley M. Smith, appealed from the decision of the District Court of Cherokee County, Kansas, to the Supreme Court of the State of Kansas, and said decision of the District Court of Cherokee, County, Kansas, was affirmed and modified, but not in any manner that affected the determination of the questions had and determined before said District Court. A copy of said Journal Entry of said Judgment and Decree are hereunto attached, marked respectively Exhibits "A" and "B," and made a part of this Answer.

Wherefore, Defendant prays that he be discharged without costs.

EDWARD E. SAPP,
E. B. MORGAN,
Attorneys for Defendant.

56 EXHIBIT "H-1."

STATE OF OKLAHOMA,
County of Ottawa, ss:

In the District Court.

No. 4103.

WESLEY M. SMITH and J. E. POTTORFF, Plaintiffs,

vs.

WALTER T. APPLE, Defendant.

Disclaimer.

Now, on this 8th day of June, 1921, comes the defendant, Walter T. Aple, and disclaims that he now has or claims any interest in the leases set forth in plaintiffs' petition.

EDWARD E. SAPP,
Attorney for Defendant.

Endorsements: No. 4103. Wesley M. Smith & J. E. Pottorff, Plaintiffs vs. Walter T. Apple, Defendant. Disclaimer. Filed in open Court State of Okla., County of Ottawa, Jun. 8, 1921. Geo. M. Henderson, Court Clerk, by Ethel McGrew, Deputy. Edward E. Sapp, Att'y for Defendant.

57 EXHIBIT "I-1."

STATE OF OKLAHOMA,
County of Ottawa, ss:

In the District Court of Ottawa County, Oklahoma.

No. 4104.

WESLEY M. SMITH and J. E. POTTORFF, Plaintiffs,

vs.

WALTER T. APPLE, Defendant.

Journal Entry.

Now on this 13th day of June, 1921, the same being a day of the regular adjourned May 1921 Term of this court this cause coming on for trial having been regularly set for trial on this date and the plaintiffs appearing in person and by their counsel, A. Scott Thompson, and the defendant appearing not and being thrice called in open court came not, and the plaintiffs produced their witnesses and

being first duly sworn gave their testimony herein and upon the so given testimony and upon the files and proceedings had herein the court finds:

First. That the defendant, Walter T. Apple, has been duly served with summons in this cause and that thereafter he entered his appearance herein and filed an answer alleging that he had acquired judgment in the district court of Cherokee County, Kansas, decreeing that he was the owner of an undivided one-half interest in and to the mining leases and rights claimed and held by the plaintiffs, Wesley M. Smith and J. E. Pottorff, on the lands described in plaintiffs' petition herein and alleging that he was the owner of such interest with said plaintiff, Wesley M. Smith, in the mining rights on the land described in the petition herein; that the plaintiff herein filed a demurrer to said answer, argument was had thereon, briefs were filed by counsel for both sides and this court took same under advisement; that before the court ruled upon said demurrer, on June 9, 1921, the defendant, W. T. Apple, came into court and asked leave to withdraw his answer and filed a written disclaimer in and to said property and the mining rights thereon.

Second. That the plaintiffs herein, Wesley M. Smith and J. E. Pottorff, Wesley M. Smith being the same as W. M. Smith, are the owners in equal parts of the mining rights granted by the owner of the fee simple title of the following described lands located in Ottawa County, Oklahoma, to-wit: Southeast quarter of the Southwest Quarter and the Southwest Quarter of the Southeast Quarter of Section 29 in Township 29 North of Range 23 East of the Indian Meridian, said mining rights being evidenced by contracts of record in the office of the county clerk of said county and found in Book 46 and on Pages 11 and 12 thereof and Book 42 and on Page 181 thereof, said mining rights expiring on the 4th day of February, 1925.

Third. That said plaintiffs are now in possession of said property under the terms of said contract mining the same and that said plaintiffs have been in possession of said property under the
58 terms of said contracts since the execution thereof mining and developing said lands and that said plaintiffs are the exclusive and sole owners of said mining rights as evidenced by said contracts and that they are the owners and holders of the estate granted in said real estate by the terms of said contracts.

Fourth. That the defendant, Walter T. Apple, prior to June 9, 1921, claimed an interest in said mining rights adverse to these plaintiffs and that such claim was a cloud upon these plaintiffs' title in and to said premises; that said defendant claimed that the plaintiff herein, Wesley M. Smith, obtained said leases for the joint use and benefit of the plaintiffs herein and said defendant, Walter T. Apple; that he was not in fact the owner of an undivided one-half interest in and to said rights granted heretofore referred to; that said defendant claimed and asserted that the plaintiff, Wesley M. Smith, had paid a cash consideration for said mining leases for and

on behalf of said defendant and that moneys had been expended by said plaintiff, Wesley M. Smith in the development of said property on the terms of these leases for and on behalf of said defendant and that said plaintiffs held said leases in trust for themselves and this defendant, Walter T. Apple. But the court finds that the claim of said Walter T. Apple that moneys were expended by the plaintiffs, or either of them for him in the securing of said leases and the development of said property is not true and further finds that said leases were taken for the joint use and benefit only of the plaintiffs herein and were not taken in trust for said defendant, Walter T. Apple, and further finds that the said defendant, Walter T. Apple, never had any interest in said leases either in law or equity.

It is therefore ordered, adjudged and decreed:

That the title and possession of said plaintiffs in the said premises above described under their mining leases above referred to be, and the same is hereby, forever settled and quieted in the plaintiffs as against all claims or demands by the said defendant and those claiming or to claim under him and that any claim heretofore made by said defendant as to an interest in said premises or the mining rights thereon is hereby cancelled and decreed void.

It is further ordered, adjudged and decreed that the said defendant, Walter T. Apple, and those claiming through, by or under him be, and they are hereby, perpetually enjoined and forbidden to claim any right, title, interest or estate in or to said premises arising by or through said mining leases or either of them hostile or adverse to the possession and title of the plaintiffs herein and said defendant those claiming under him are perpetually enjoined and forbidden from commencing any suit to disturb the said plaintiffs, or either of them, in their said possession and title to said premises, from setting up or asserting any claim or defense adverse to the title of plaintiffs herein or either of them, and from in any manner disturbing plaintiffs, or either of them, in their peaceable and quiet possession and enjoyment of said premises.

It is further adjudged that plaintiffs have and recover their costs from the defendant incurred prior to June 9, 1921, herein.

S. C. FULLERTON,
Judge.

Endorsed: No. 4104. Wesley M. Smith, et al. vs. Walter T. Apple. Journal Entry. Filed in Open Court, State of Oklahoma, County of Ottawa, June 14, 1921. Geo. M. Henderson, Court Cler-, by Ethel McGrew, Deputy. Civil J. 8 Page 2-3.

60 EXHIBIT "J."

243.

Journal District Court, Cherokee County, Kansas, Sitting at Galena.

September Term, A. D. 1920, Second Judicial Day, September 7, 1920.

W. T. APPLE, Plaintiff,

vs.

WESLEY M. SMITH, Defendant.

Now on this 7th day of September, 1920 the same being a regular day of the September 1920 term of said court, the cause comes on for hearing on the motion of the plaintiff for an order confirming the report of the referee and for judgment in accordance with the findings and recommendations therein contained.

Plaintiff appears by E. B. Morgan, one of his attorneys, but the defendant appears not, either in person or by attorney, and after examining said findings of fact as made, and conclusions of law as found by said referee the court finds that the report of said referee should be and the same is hereby confirmed and adopted by the court.

The court further finds that the plaintiff is entitled to a judgment against the defendant for the sum of $148,617.98, the same being the amount found due the plaintiff on the accounting had before the referee for the royalties received by the defendant since the accounting heretofore had herein over and above the royalties received by the plaintiff since the date of said accounting, together with the value of the interest of the plaintiff in the leasehold interest held by said defendant over and above the value of the leasehold interests held by the plaintiff.

The court further finds that the defendant did not, prior to the date of accounting before the referee, file with the Clerk of this Court assignments or other conveyances of the leasehold interest so held by him, and in his name belonging to the firm of Apple & Smith, as directed by the judgment and decree of said court.

It is therefore by the Court considered ordered and adjudged that the plaintiff do have and recover of and from the defendant Wesley M. Smith the sum of $148,617.98, together with the costs of this proceeding, and all costs subsequent to the rendition of the former judgment herein, this judgment to be in addition to the judgment for $55,042.03½ and costs which was heretofore rendered herein.

And it is further considered, ordered and adjudged that the plaintiff do have and recover his costs herein. That the plaintiff shall pay to the stenographer Nellie Mitchell Swaney as her fee for taking and transcribing the testimony before the referee the sum of $41.70, and the plaintiff is also hereby awarded said amount to be included in the costs, and the plaintiff is also awarded a further judgment to

be included in said case in the sum of $1,000, as a fee for the referee for his services as Referee in this matter in addition to the fee awarded to said referee in the former trial herein, for all of which execution is hereby awarded.

61 EXHIBIT "J-1."

Decree in Equity.

This cause coming on to be heard on the 18th day of April, 1919, at the City of Muskogee, in the United States District Court in and for the Eastern District of Oklahoma, upon the amended petition of the plaintiffs, W. P. McCullough, B. E. Beth and Thomas F. Phillips, and the amended answer of the defendant, the plaintiffs, W. P. McCullough, B. E. Beth and Thomas F. Phillips appear by their attorneys Paul A. Ewert, A. C. Towne, and James Davenport, and the defendant appears in person and by his Attorneys, A. Scott Thompson, H. W. Currey and Leslie J. Lyons, and the parties announce ready for trial. After hearing the evidence, the arguments of counsel, and considering the briefs subsequently filed by the plaintiffs and defendant respectively, the Court finds the issues in this case in favor of the plaintiffs and against the defendant.

The Court further finds that the mining lease under which the plaintiffs claim in this suit, made, executed and delivered by Leander J. Fish to Dallas Hopper under date of April 19, 1912, and thereafter, to-wit: On the 29th day of April, 1912, filed for record in the office of the Register of Deeds in and for Ottawa County, Oklahoma, and there recorded in Book 31, on page 167 of the records of said office, leasing to the said Dallas Hopper for mining purposes, *the*

The East One-half (E. ½) of the Northwest Quarter (N. W. ¼) and the Southeast Quarter (S. E. ¼) of the Northeast Quarter N. E. ¼) of Section Thirty-two (32), Township Twenty-nine (29), Range Twenty-three (23), East of the Indian Meridian, Ottawa County, Oklahoma,

and thereafter assigned to the plaintiffs in this suit, was, at the date of its execution and delivery, and now is, a valid mining lease upon said lands for the period and term therein named.

The Court further finds that the mining lease under which the defendant claims, to-wit: That certain mining lease made, executed and delivered under date of November 4, 1912, by Leander J. Fish to Wesley M. Smith, covering the

East One-half (E. ½) of the Northwest Quarter (N. W. ¼) of Section Thirty-two (32), Township Twenty-nine (29), Range Twenty-three (23), East of the Indian Meridian, Ottawa County, Oklahoma,

(and other lands not mentioned in this suit), and thereafter, to-wit: On the 11th day of December, 1912, filed for record in the office of the Register of Deeds in and for Ottawa County Oklahoma, was, at

the time of its execution and deliverey, and now is, an invalid mining lease upon said lands as against these plaintiffs, and that the defendant has no valid mining lease upon said land, nor any right, title or interest of any kind therein as against these plaintiffs for the term of plaintiff's said lease.

The court further finds that the mining lease made, executed and delivered on the 6th day of January, 1913, by Leander J.
62 Fish to the defendant, W. M. Smith, leasing to the said lessee for mining purposes the

Southeast quarter (S. E. ¼) of the Northeast Quarter (N. E. ¼) of Section Thirty-two (32) Township Twenty-nine (29), Range Twenty-three (23), East of the Indian Meridian, Ottawa County, Oklahoma,

for the term of ten years, which said lease was thereafter, to-wit: On the 11th day of January, 1913, filed for record in the office of the Register of Deeds in and for Ottawa County, Oklahoma, and there recorded in Book 34 on Page 77 of the records of said office, was, at the date of its execution and delivery, and now is, an invalid mining lease and as against the plaintiffs for the term of their said lease, is invalid, that the said defendant has no valid lease upon said lands, nor any right, title or interest of any kind therein as against the plaintiffs for the term of plaintiffs' said lease.

Wherefore: It is hereby ordered, adjudged and decree that the said lease under which the plaintiffs claim, dated April 29, 1912, and recorded as hereinbefore alleged, covering the herein described lands, is and was a valid mining lease upon said lands for the term therein named, and that the lease under which the defendant claims dated November 4, 1912, and January 6, 1913, and recorded as hereinbefore alleged, were and are void and of no effect as against the rights of the plaintiffs for the term named in their said lease, and the same are hereby annulled and cancelled of record pro tanto, that is in so far as they conflict with the plaintiffs lease and the relief prayed for by the defendant in his answer is denied.

The Court further finds that prior to the filing of this suit the said Dallas Hopper assigned all his right, title and interest in and to the said mining lease to the plaintiffs, W. P. McCullough, B. E. Beth and Thomas F. Phillips, and that they were at the time of the filing of this suit, the owners and holders of said lease and at said time were in possession of the hereinbefore described lands under and pursuant to the terms and conditions thereof: that shortly after the filing of this suit the defendant wrongfully and unlawfully dispossessed the said plaintiffs of a portion of said land, to-wit:

The East One-half (E. ½) of the Northwest Quarter (N. W. ¼) of Section Thirty-two (32), Township Twenty-nine (29), Range Twenty-three (23), East of the Indian Meridian, Ottawa County, Oklahoma,

and ever since said time has been and now is wrongfully and unlawfully in possession of said premises.

Wherefore it is further ordered, adjudged and decreed, That the writ of injunction heretofore issued out of this Court restraining the plaintiffs from entering or attempting to enter into the possession of the said

East One-half (E. ½) of the Northwest Quarter (N. W. ¼) of Section Thirty-two (32), Township Twenty-nine (29), Range Twenty-three (23), Ottawa County, Oklahoma,

63 be, and is dissolved, and the defendants, their agent and employees are hereby enjoined from interfering with plaintiffs' possession of any said lands which are now in their possession for mining purposes.

It is further ordered, adjudged and decreed, That the plaintiffs have judgment against the said defendant for their costs and disbursements herein, to which action of the Court the defendants in open Court duly excepts and still excepts.

Dated at Muskogee, Oklahoma, this 30th day of October, 1920.

(Signed) R. L. WILLIAMS,
United States District Judge."

64 In the District Court of the United States for the Third Division of the District of Kansas, at Fort Scott.

No. 149-N.

WESLEY M. SMITH, Complainant,

vs.

WALTER T. APPLE, Defendant.

Motion to Dismiss.

Comes now Walter T. Apple, the defendant in the above entitled action, and moves the court to dismiss this action, and that he take his costs in this suit incurred, for the following reasons:

1st. Because it appears in the complaint filed in this cause that the complainant, Wesley M. Smith, was at the time of the rendition of the judgement complained of in said petition, a citizen of the same state as the state in which the defendant herein, Walter T. Apple, was a citizen, and therefore, no diversity of citizenship existed as alleged, upon which basis the court is alleged to have jurisdiction.

2nd. That there is an insufficiency of facts to constitute a valid cause of action in equity against the defendant.

EDWARD E. SAPP,
E. B. MORGAN,
Solicitors for Defendant.

Filed in the District Court January 18, 1922.

65 In the District Court of the United States for the District of Kansas, Third Division, Fort Scott.

No. 149-N.

WESLEY M. SMITH, Complainant,

vs.

WALTER T. APPLE, Defendant.

Stipulation.

It is hereby stipulated and agreed between the complainant and defendant herein that the Motion to Dismiss filed to the original Bill of Complaint hereby by the Defendant, shall be treated as being filed against and extending to the amended bill of complaint, and that all notices thereunder are waived and the argument heretofore made before the Hon. John C. Pollock, shall be treated as made to the Amended Bill of Complaint; the defendant to file his brief upon said Motion within ten (10) days from March 1st, 1922, and the Complainant to file his Reply Brief within thirty (30) days thereafter, said Motion to Dismiss to be submitted upon said briefs and the arguments heretofore made, and such further argument as the Court may permit.

A. SCOTT THOMPSON,
JOHN S. DEANT,
ASP, SNYDER, OWEN & LYBRAND,
Attorneys for Complainant.

E. E. SAPP,
E. B. MORGAN,
Attorneys for Defendant.

Filed in the District Court March 23, 1922.

66 In the District Court of the United States for the District of Kansas, Third Division.

No. 149-N.

WESLEY M. SMITH, Complainant,

v.

WALTER T. APPLE, Defendant.

Memo.

This case stands pending on a motion interposed by defendant to dismiss the bill of complaint and amendment thereto for want of jurisdiction, also, for want of equity.

The suit involves large property interests litigated in the trial court and Supreme Court of the State. The purpose of the suit is to restrain further proceedings in the enforcement of judgments rendered in favor of the defendant and against the plaintiff *to* this suit, and to suspend further litigation in case 436 on the records of this Division of the District, wherein W. T. Apple is plaintiff and G. L. Coleman is defendant.

In examining the matter I am constrained to believe in so far as restraint of further proceedings in the cours*t* of the state are concerned, the injunction prayed for in this suit is within the letter and spirit of the prohibition of Section 265 of the Judicial Code, which is a re-enactment of Section 720 Revised Statutes, and that the motion to dismiss interposed in this suit should be sustained.

It is so ordered.

JOHN C. POLLOCK,
Judge.

Kansas City, Kansas, June 17, 1922.

Filed June 19, 1922.

67 In the District Court of the United States for the Third Division of the District of Kansas, at Fort Scott.

No. 149-N.

WESLEY M. SMITH, Complainant,

v.

WALTER T. APPLE, Defendant.

Order.

Now, to-wit, on this 19th day of June, 1922, for the reasons stated in the memo. dated June 17, 1922, and filed June 19, 1922, this case is dismissed at the costs of complainant.

JOHN C. POLLOCK,
Judge.

Filed June 19, 1922.

68 *Petition for Appeal.*

To the Honorable John C. Pollock, United States District Judge of Kansas:

The above named plaintiff, Wesley M. Smith, feeling aggrieved by the order and decree made and entered in this cause on the 19th day of June, 1922, does hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said

decree was based duly authenticated, may be sent to the Supreme Court of the United States sitting at Washington in the District of Columbia.

Your petitioner further prays that the proper order touching security to be required of him to perfect his appeal be made.

HENRY E. ASP,
SCOTT THOMPSON,
JOHN S. DEAN,
Attorneys for Complainant.

Filed in the District Court September 11, 1922.

69 *Order Allowing Appeal.*

On motion of counsel for complainant and on consideration of the foregoing petition for appeal, it is hereby ordered that an appeal to the Supreme Court of the United States from the order and decree heretofore on the 19th day of June, 1922, file- and entered herein be, and the same is, hereby allowed. The said judgment, order and decree dismissing the said cause and the amended bill of complaint herein was made upon consideration solely of the question of the court's jurisdiction of the said action under the provisions of Section 265 of the Judicial Code.

It is further ordered that a certified transcript of the record, exhibits and all proceedings in said cause be forthwith transmitted to the said Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of One Thousand ($1,000) Dollars.

ARBA S. VAN VALKENBURGH,
District Judge, Assigned to District of Kansas.

Dated Sept. 8, 1922. Filed in the District Court September 11, 1922.

70 *Bond on Appeal.*

Know all men by these presents, That we, Wesley M. Smith, as principal, and G. L. Coleman and J. F. Robinson, as sureties, acknowledge ourselves to be join-ly indebted to Walter T. Apple, appellee in the above entitled cause in the sum of $1,000.00 conditioned that, whereas, on the 19th day of June, A. D. 1922, in the District Court of the United States for the District of Kansas, Third Division, in a suit depending in that court wherein Wesley M. Smith was plaintiff and Walter T. Apple was defendant, numbered on the Equity Docket of said court as No. 149-N a decree was rendered against the said Wesley M. Smith and the said Wesley M. Smith having obtained an appeal to the Supreme Court of the United States and filed a copy thereof in the office of the Clerk of the Court to reverse said decree and a citation directed to the said Walter T. Apple citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden in the City of Washington

in the District of Columbia on the first Monday in October, A. D. 1922, next.

Now, if the said Wesley M. Smith shall prosecute his appeal to effect and answer all costs that may be adjudged against him if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

WESLEY M. SMITH,
Principal.
G. L. COLEMAN,
Surety.
J. F. ROBINSON,
Surety.

Allowed: Sept. 8, 1922.
ARBA S. VANVALKENBURGH,
District Judge.

71 STATE OF OKLAHOMA,
County of Ottawa, ss:

J. F. Robinson and G. L. Coleman each on their respective oaths state:

That they are each resident freeholders of Ottawa County, Oklahoma, and are worth over and above their exemptions and all liabilities the amount set opposite their respective names.

G. L. COLEMAN. $5,000.00.
J. F. ROBINSON. $5,000.00.

Subcribed and sworn to before me this 13th day of July, 1922.

[SEAL.]
R. J. TUTHILL,
Notary Public.

My commission expires Feby. 25, 1925.
Filed in the District Court September 11, 1922.

72 *Assignment of Errors.*

And now on this the 8 day of September, 1922, came the defendant by his solicitors, John S. Dean, A. Scott Thompson and Henry E. Asp, and says that the decree entered in the above cause on the 19th day of June, 1922, is erroneous and unjust to defendant for the following reasons, to-wit:

First Assignment of Error.

That the said Court erred in holding that under the provisions of Section 265 of the Judicial Code of the United States the District Court within and for the State of Kansas, Third Division, did not have the power or jurisdiction to grant the relief prayed for in the amended bill of complaint filed herein and was prohibited by the provisions of said statute from granting the relief prayed for in the amended bill of complaint.

Second Assignment of Error.

The court below erred in holding that the injun-tion prayed for in this suit (in the amended bill of complaint herein filed) is within the letter and spirit of the prohibition of Section 265 of the Judicial Code which is a reenactment of Section 720 Revised Statutes, and that the motion to dismiss interposed in this suit should be sustained."

Third Assignment of Error.

The Court below erred in its final order and decree dismissing this suit in the court below upon the ground and for the reason given by said court that the relief sought for in the amended bill of complaint came within the letter and spirit of the prohibition of Section 265 of the Judicial Code of the United States.

Wherefore the defendant prays that said order and decree be reversed.

HENRY F. ASP,
SCOTT THOMPSON,
JOHN S. DEAN,
Attorneys for Complainant.

Filed in the District Court September 11, 1922.

73 In the District Court of the United States for the District of Kansas, Third Division, at Fort Scott.

No. 149-N.

WESLEY M. SMITH, Complainant,

v.

WALTER T. APPLE, Defendant.

Præcipe for Transcript.

To the clerk of said court:

You will prepare a transcript, as provided by law, for the Supreme Court of the United States in the appeal taken by the complainant herein setting out the following portions of the record in said case:

1. Amended bill of complaint.

2. Motion to dismiss.

3. Stipulation between complainant and defendant that the motion to dismiss be treated as filed against the amended bill of complaint; that all notices thereunder be waived, and that arguments

heretofore made before Hon. John C. Pollock be treated as made to the amended bill of complaint.

4. Memo of the decision of Judge Pollock.

5. Journal entry of judgment.

HENRY E. ASP,
SCOTT THOMPSON,
JOHN S. DEAN,
Attorneys for Complainant.

Filed in the District Court September 13, 1922.

74 *Clerk's Certificate to Transcript.*

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Frank L. Campbell, Clerk of the District Court of the United States for the District of Kansas, do hereby certify the within and foregoing to be a full, true and complete transcript of the pleadings, proceedings and record, now on file and of record in my office, in a certain cause lately in said court pending, wherein Wesley M. Smith, is plaintiff, and Walter T. Apple, is defendant, as it purports to contain, and is made pursuant to the præcipe filed herein.

I further certify that the original Citation is transmitted herewith.

In Testimony Whereof, I hereunto set my hand and affix the Seal of said court, at my office, in Fort Scott, in said District of Kansas, this 14th day of September, A. D. 1922.

[Seal of District Court, U. S., District of Kansas, Third Division.]

F. L. CAMPBELL,
Clerk.

By C. N. PRICE,
Deputy Clerk in Charge of the Third Division.

Endorsed on cover: File No. 29,152. Kansas D. C. U. S. Term No. 602. Wesley M. Smith, appellant, vs. Walter T. Apple. Filed September 19th, 1922. File No. 29,152.

Office Supreme Court, U.S.
FILED
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WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 124.

WESLEY M. SMITH, APPELLANT,

vs.

WALTER T. APPLE, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF AND ARGUMENT ON BEHALF OF APPELLEE.

EDWARD E. SAPP,
P. P. CAMPBELL,
Attorneys for Appellee.

(29,152)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 124.

WESLEY M. SMITH, APPELLANT,

vs.

WALTER T. APPLE, APPELLEE.

BRIEF AND ARGUMENT ON BEHALF OF APPELLEE.

Statement of Facts.

An examination of the brief of the appellant discloses that a sufficient statement of facts is not contained in the brief to advise the court of the nature of the controversy out of which the litigation arose between the appellant and the appellee herein. Therefore a brief statement of the facts is deemed important in this brief for the appellee.

On July 12, 1916, appellant Smith and the appellee Apple were residents of Baxter Springs, Cherokee County, Kansas,

and engaged in the real estate, loan, and insurance business. Among other things, they dealt in agricultural, grazing, and lead and zinc mining leases and dealt in royalties on the last-named leases in Kansas and Oklahoma.

On the 12th day of July, 1916, Apple brought suit against Smith in the District Court of Cherokee County, Kansas, the county in which appellant and the appellee resided and had their place of business. The action was for an accounting and dissolution of their partnership business. After the issues were joined a referee was appointed by the court to make certain findings of fact. The referee was directed to find whether a partnership existed between Apple and Smith and, if so, to take an accounting of the partnership business and the respective rights of the partners.

Apple, the plaintiff, and Smith, the defendant, parties to that suit and such witnesses as they produced were heard by the referee. The referee reported to the court that there was a partnership existing between Walter T. Apple, the appellee, herein, and Wesley M. Smith, the appellant herein, and that some of the partnership property was mining leases, part of which were then in operation in both Cherokee County, Kansas, and Ottawa County, Oklahoma, and that there was due to Walter T. Apple, the plaintiff in that case, from Wesley M. Smith, the defendant, the sum of fifty-five thousand forty-two dollars and three and one-half cents ($55,042.03½), and that Smith should turn over the leases held in his name and Apple should turn over those held in his name to a receiver.

The trial court approved the report of the referee and entered judgment and decree thereon. Thereafter an appeal was taken by Smith, the defendant in that action, to the

Supreme Court of Kansas. Briefs were filed in the Supreme Court and the case was argued. The Supreme Court sustained the judgment of the District Court of Cherokee County. Thereupon Smith, the appellant herein, filed in the Supreme Court of the United States a petition asking for a writ of certiorari to the Supreme Court of the State of Kansas. The petition for the writ of certiorari was denied. Soon after a bill in equity was filed in the United States District Court for the District of Kansas setting forth in all respects the same facts as were set forth in the petition for the writ of certiorari in this court. The bill in equity prayed for a writ of injunction out of the District Court of the United States against the enforcement of the judgments and decrees of the District Court of Cherokee County, Kansas, in favor of Apple and against Smith.

The case was briefed and argued in the District Court of the United States for the District of Kansas, and the court, being fully advised, dismissed the bill in equity in the following language:

> "This case stands pending on a motion interposed by defendant to dismiss the bill of complaint and amendment thereto for want of jurisdiction, also, for want of equity.
>
> "The suit involves large property interests litigated in the trial court and Supreme Court of the State. The purpose of the suit is to restrain further proceedings in the enforcement of judgments rendered in favor of the defendant and against the plaintiff to this suit, and to suspend further litigation in case No. 436 on the records of this Division of the District, wherein W. T. Apple is plaintiff and G. L. Coleman is defendant.

> "In examining the matter I am constrained to believe in so far as restraint of further proceedings in the courts of the state are concerned, the injunction prayed for in this suit is within the letter and spirit of the prohibition of Section 265 of the Judicial Code, which is a re-enactment of Section 720, Revised Statutes, and that the motion to dismiss interposed in this suit should be sustained.
>
> "It is so ordered."

From that judgment and order of the District Court of the United States for the District of Kansas the appellant brings the case here.

From this statement of facts it is apparent that the only question to be determined by this court is as to whether or not the questions settled by the judgment of the District Court of Cherokee County, Kansas, sustained by the Supreme Court of the State of Kansas, a writ of certiorari having been denied by the Supreme Court of the United States, will be again reviewed by this court on the appeal now pending.

We think there is no constitutional or any other question raised in the record that takes this case beyond the provisions of section 265 of the Judicial Code upon which the court below rendered its judgment denying the writ of injunction.

The bill in equity did not charge either fraud or collusion, nor plead facts that would appeal to a court of equity. In answer to the suggestion that the trial court did not examine the bill in equity before rendering its judgment, it is only necessary to say that the presumption is to the contrary.

BRIEF AND ARGUMENT OF THE APPELLEE.

The trial court in Cherokee County, Kansas, found and the Supreme Court of that State approved the finding that a partnership existed between Apple and Smith, and that they had, among other things, mineral leases in Kansas and Oklahoma. The trial court found and the Supreme Court approved the finding that on the accounting of the partnership affairs Smith was indebted to Apple in the sum of fifty-five thousand forty-two dollars and three and one-half cents ($55,042.03½), and judgment was entered in behalf of Apple against Smith for that amount. (See Apple *vs.* Smith, 105 Kansas, 732, and Apple *vs.* Smith, 106 Kansas, 717.)

A leading case upon the question of power and jurisdiction of the court in this character of the case is Dunlap *vs.* Byers, 110 Mich., 109. A partnership accounting case directly in point, to wit, partnership accounting and disposition of property in various States, is Lyman *vs.* Lyman, 2d Paine, 11 (Circuit Court Reports), in which it says:

> "Bill to have an account and settlement of a partnership concern. Bill alleged the partnership to be one of the most general description, extend to all business of every kind. Object in the beginning was to carry on trade and merchandise. As capital increased, business extended, entered navigation, importing goods, purchased and sold vessels, and entered into and pursued any sort of trade or merchandise, and other business at discretion. Partners being at different places, each purchased land, turnpike shares, built bridges, purchased shares in toll bridges and purchased and sold any kind of estate whatever,

and paid out of the funds of the partnership, and took the deeds or other evidence of title to both or either of said partners, as convenience or other motive might require; no articles of partnership between them, and no accounts kept, even the family expenses being paid out of the partnership funds. It is immaterial whether the legal title stands in one or both the partners; for in such case, a court of equity will consider the party holding the legal title as a trustee for those beneficially interested."

"On a question of jurisdiction, page 46, the Court said another objection which has been made to such an order is that as the lands lie in different states, the order could not be enforced, except as to the lands within this district or state. This objection cannot be well founded. Such an order does not require the agency of any officer out of the jurisdiction of this court. The order is to act upon the parties in the cause, and the transfer of the title is to come from them, and not the persons through whose agency the sale shall be made. It is not like the case of land sold under execution. If the Court has not the power to order a sale, it has not jurisdiction over the subject matter at all, and cannot divide the land or compel either party to release his title to that lying in another state, and suits must be commenced in each state where the land lies. *Such inconvenience in the administration of justice cannot be tolerated, and the powers of this court, we think, are amply sufficient to direct a public sale of the land, and to compel the parties to convey the title accordingly.*"

"In Fall *vs.* Eastin, 215 U. S., 1, a court of chancery acting *in personam* may decree the conveyance of land in any other State and may well enforce its

decree against the defendant, but neither the decree itself nor the conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court."

In Meadow *vs.* Manlove, 97 Kans., 706:

"Where a court of general jurisdiction has secured jurisdiction of the parties who held legal title to land in another State, it may render a judgment to impress a trust as to such land, and order the trustee to execute conveyance thereof; and the possible difficulties which may attend the enforcement of its judgment do not in anywise abridge its jurisdiction."

In Phelps *vs.* *McDonald*, 99 U. S., 298-308, this court lays down the same rule.

In Massie *vs.* Watts, 6th Cranch, 184 (U. S.), the same principle is enunciated.

In the early case of William Penn *vs.* Lord Baltimore, 1 Ves., 444, the decree involved an interest in land in a foreign country, and the rule laid down in that case is upheld and followed very largely by our own courts.

Cherokee Nation *vs.* The State of Georgia, 5th Peters, U. S., p. 1, the court holds to the rule laid down in both the Massie and Watts case and the Penn *vs.* Lord Baltimore above cited.

In the case of Indiana R. R. Co. *vs.* The Michigan Central R. R. Co., of 16th Howard, U. S., 243, the Baltimore case and the Massie *vs.* Watts case are again sustained and supported by additional authority.

In the case of Allen *vs.* Winthrow, 110 U. S., 119, Justice Field says:

> "Real property owned by a partnership and purchased with partnership funds is, for the purpose of settling the debts of the partnership and distributing its effects, treated in equity as personal property."

The same rule is followed in Devaney *vs.* Mahoney, 23 N. J. Eq., 242, and in Rice *vs.* Barnard, 20 Vt., 497.

In Mauck *vs.* Mauck, 54 Ill., 261, the court says that real estate purchased as firm property and held as such partakes in equity of the character of personal property to the extent that it is under the control of the chancellor in making a final adjustment.

We call the court's attention to the rule laid down in Pomeroy's Equity Jurisprudence, volume 4, section 1318, page 2632.

Rents or royalties accruing from leased mining lands are personal property. This was recently determined in the case of U. S. *vs.* Noble, 237 U. S., 74.

The Effect of the Denial of the Writ of Certiorari.

The denial of the writ of certiorari was a general finding against the appellant by the Supreme Court of the United States and is conclusive as to the questions raised herein.

Apple *vs.* Smith, 254 U. S., 636.
Marlinton *vs.* Fairbanks, 112 U. S., 670.
Lehnen *vs.* Dixon, 48 U. S., 71.
McDoyle *vs.* McCormick, 121 Fed. Rep., 61.
Hughes *vs.* Livingston, 104 Fed. Rep., 306.

> "The mere assertion by the plaintiffs of a constitutional question, or that they have been deprived of

their property without due process of law does not establish jurisdiction."

Newberry Port Water Co. *vs.* Newberry Port, 193 U. S., 561.

Maynard *vs.* Hatch, 151 U. S., 324.

New Orleans Water Works Co. *vs.* Louisiana, 185 U. S., 336.

St. Joseph & G. I. R. R. Co. *vs.* Steel, 167 U. S., 559.

Western Union Telegraph Co. *vs.* Ann Arbor R. R. Co., 78 U. S., 229.

Lampassas *vs.* Bell, 180 U. S., 276.

Which question brings back the thought that the court below must have examined the bill from its four corners and found that the very question then presented to it for determination had been formally and conclusively determined by the courts of Kansas and by this court when it denied the writ of certiorari. Apple *vs.* Smith, 254 U. S., 636.

The rules governing a petition for a writ of certiorari require the entire record of the court to be brought up and inspected, so that that court may determine from the case whether the inferior court has exceeded its jurisdiction or has not proceeded according to the essential requirements of law where no direct appellant proceedings are provided:

Dege *vs.* Hitchcock, 229 U. S., 162.

Hartranft *vs.* Mallway, 247 U. S., 295.

And certiorari going only to the question of jurisdiction of the inferior court, the determination upon that question is final.

Harris *vs.* Barber, 129 U. S., 336.

Luckenback *vs.* McCowan Sugar Co., 248 U. S., 139.

Green County *vs.* Thomas, 211 U. S., 598.

The bill in equity in the court below in this case included the petition for the writ of certiorari and pleaded that the writ had been denied.

The question of granting or denying the writ being entirely in the discretion of this court, the court below properly refused to review the action of the Supreme Court in exercising that discretion; and in refusing to grant the injunction prayed for we think the court below was right.

People *vs.* Walters, 68 N. Y., 403.

People *vs.* Board of County Commissioners, 97 N. Y., 37.

People *vs.* Kelley, 24 N. Y., 74.

Commissioners *vs.* Kane, 2d Jones, 288.

Ketchum *vs.* Superior Court, 65 Calif., 294.

Teid *vs.* Carstensen, 61 Iowa, 334.

State *vs.* Bushby, 44 N. J. Law, 625.

Livingston *vs.* Rector of Trinity Church, 45 N. J. L., 530.

Res Judicata.

The determination of the Supreme Court of the State of Kansas and the submission of the question of its jurisdiction of the subject-matter to this court by petition for writ of certiorari which was denied is *res judicata* of the entire question.

Fayerweather *vs.* Ritch, 195 U. S., 276.

Lawrence *vs.* Nelson, 143 U. S. 215; 12 S. Ct., 440; 36 L. Ed., 130.

Gila Bend Reservoir & Irrigation Co. *vs.* Gila Water Co., 27 S. Ct., 495; 205 U. S., 279; 51 L. Ed., 801.

Ellis *vs.* Crowl, 46 Kans., 100.

We quote from the opinion of Justice Brewer in Fayerweather *vs.* Ritch, above cited:

> "Private right and public welfare unite in demanding that a question once adjudicated by a court of competent jurisdiction shall, except in direct proceedings to review, be considered as finally settled and conclusive upon the parties."

Appellant estopped by record. Cromwell *vs.* County Sac., 94 U. S., 351-352.

We therefore respectfully urge that the court affirm the judgment of the court below or grant such other and further relief as the case may warrant.

Respectfully submitted,

EDWARD E. SAPP,
PHILIP P. CAMPBELL,
Attorneys for Appellee.

NOV 27 1923
W. R.

IN THE

Supreme Court of the United States.

No. 602. 124

WESLEY M. SMITH, Appellant,

vs.

WALTER T. APPLE, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Brief and Argument on Behalf of Appellant.

A. SCOTT THOMPSON,
JOHN S. DEAN,
HARRY W. COLMERY,
Attorneys for Appellant.

IN THE

Supreme Court of the United States.

No. 602.

WESLEY M. SMITH, Appellant,

vs.

WALTER T. APPLE, Appellee.

Brief and Argument on Behalf of Appellant.

STATEMENT OF FACTS.

This was a suit brought in the United States District Court for the District of Kansas, Third Division, to enjoin the appellee "from enforcing or attempting to enforce certain judgments and decrees of the District Court of Cherokee County, Kansas." (Tr. 20.)

The judgments and decrees sought to be enjoined are set out in full in the transcript of the record in this case as Exhibit "B" at page 26, et seq., and as Exhibit "J" at page 50.

The amended bill of complaint (Tr. 3, et seq.) sets forth in detail a complete history of the litigation in the state courts of Kansas.

The court below held that the suit was "within the letter and spirit of the prohibition of section 265 of the judicial code, which is a reenactment of section 720, Revised Statutes, and that the motion to dismiss in this case should be sustained." (Tr. 55.)

It further appears from the order allowing the appeal that "the said judgment, order and decree dismissing the said cause, and the amended bill of complaint herein, was made upon consideration solely of the question of the court's jurisdiction of the said action under the provisions of section 265 of the judicial code." (Tr. 56.)

BRIEF AND ARGUMENT.

I.

Since it appears from the record that the court below did not pass upon the merits of this case, but sustained a motion to dismiss the cause upon the theory that the case came within the prohibition of section 265 of the judicial code, there is but one question arising upon the record for the decision of this court. That question may be stated as follows:

Where final judgment has been rendered by a state court, is it within the jurisdiction of a federal court having the parties properly before it, to enjoin the successful litigant in the state court from enforcing his judgment where such judgment of the state court is void, or where other equitable grounds for the injunction are shown?

The following authorities appear to us to be decisive of the question:

In the case of Wells Fargo & Co. v. Taylor, 254 U. S. 175, the second and third syllabus state the law as follows:

> "The provision of the Judicial Code (Sec. 265, formerly Rev. Stats., Sec. 720) forbidding any court of the United States to grant an injunction to stay proceedings in any court of a State, is intended to give effect to the principle of comity and to prevent unseemly interference with the orderly disposal of litigation in the state courts, but not to hamper the federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and by the laws of congress. P. 182.
>
> "The inhibition does not forbid the federal courts to enjoin a party from collecting a judgment obtained in a state court where its enforcement would be contrary to reognized principles of equity and the standards of good conscience."

In the case of Public Service Co., v. Corboy, 250 U. S. 153, the second syllabus is as follows:

> "Section 265 of the Judicial Code, forbidding the granting of injunctions by courts of the United States to stay proceedings in any state court, except when authorized in bankruptcy cases, refers only to proceedings in which a final judgment or order has not been entered and in which the power exerted is judicial as distinguished by the Constitution from powers legislative and executive."

In the opinion at pages 159-162 inc., the late Chief Justice of the Supreme Court considers this question.

In the case of Chicago, R. I. & P. Ry. Co. v. Vallicotte, 267 Fed. Rep. 799, the syllabus at 799-780 are as follows:

> "Where plaintiff, in an action for personal injury, feigned total paralysis of his legs as a result of his injury, falsely testifying and causing others to testify,

that it had continued from the time of injury to that of the trial, six months later, and through conspiracy with others fabricated a history of the case showing such continuance, and caused to be produced temporary paralysis at the times of examination by medical experts, which could not be detected by ordinary medical tests, upon which history and examinations the experts based their testimony that the paralysis was permanent, and such fact were not known to, or discoverable by, the defendant until after judgment, against which it had no remedy at law, the case held to warrant injunction.

"That a judgment was rendered by a state court does not affect the power of a federal court of equity to enjoin its enforcement since the injunction acts on the party, and not on the court."

In the opinion, at page 810, the court say:

"That the judgment against which relief is sought was rendered in the state court is not material. In cases of this character the injunction acts not on the court rendering the judgment, but on the party. Arrowsmith v. Gleason, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. ed. 630; Marshall v. Holmes, 1441 U. S. 589, 12 Sup. Ct. 62, 35 L. ed. 870; McDaniel v. Traylor, 196 U. S. 415, 25 Sup. Ct. 369, 49 L. ed. 533; Simon v. Railway, 236 U. S. 115, 35 Sup. Ct. 225, 59 L. ed. 492; Graver v. Faurot, 76 Fed. 257, 22 C. C. A. 156; Nat. Surety Co. v. State Bank, 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394; Lehman v. Graham, 135 Fed. 39, 67 C. C. A. 513; Union Ry. Co. v. Ill. Cent. Ry. 207 Fed. 745, 125 C. C. A. 283; N. W. Port Huron Co. v. Babcock, 223 Fed. 479, 139 C. C. A. 27."

In Essanay Film Co. v. Kane, 256 Fed. 271, the syllabus of the case is as follows:

"Under Judicial Code, Sec. 265, (Com. p. St. Sec. 1242), formerly Rev. St. Sec. 720, a federal court is without jurisdiction to grant an injunction to stay an action in a state court on the ground of want of service on the defendant, unless a final judgment capable of being enforced has been rendered therein."

In the opinion at page 271-272 the court say:

> "The plaintiff relies solely upon Simon v. Southern Ry. Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. ed. 492, and contends that under it the case at bar is not within the limitation referred to. However, the Simon case dealt with an attempted enforcement of a final judgment. This difference is vital. Mr. Justice Lamar in that case (236 U. S. 123-125, 35 Sup. Ct. 258, 59 L. ed. 492) expressly noted that, with the rendering of a final judgment and an attempt to enforce it, 'a new state of facts, not within the language of the statute, may arise'; that the federal court's control over the judgment was to be determined by well-recognized equity powers to prevent an improper enforcement or inequitable use of it; and that to enjoin a judgment obtained without service was within its jurisdiction, notwithstanding the limitations of the statute."

In the case of Mohawk Oil Co. v. Layne, 270 Fed. 841, the first syllabus states the law as follows:

> "If judgments of a state court are void wholly or as to a particular party, and the other requisites of jurisdiction are present, a federal court may enjoin their execution, notwithstanding Rev. St. Sec. 720 (Comp. St. Sec. 1242), providing that a United States court shall not stay proceedings in any state court."

In the opinion at page 847-8 the court say:

> "In the Simon case, Simon had obtained in the state court in Louisiana, a large judgment against the railway company for damages for personal injuries on a cause of action which arose in Alabama. Process was served on the Secretary of State on the allegation that the defendant was a foreign corporation doing business in the state, whereas, in fact, it was not doing business in the state. The suit proceeded to judgment by default for a fraudulently exaggerated sum, without the knowledge of the railway company, which, on learning of the judgment, and that an attempt would be made by Simon to enforce

it by *fieri facias*, filed suit in the United States court and obtained an injunction restraining him from doing so. The case was first before the Supreme Court on Simon's application for writ of *habeas corpus*, he having been sentenced to prison for violation of the injunction. *Ex parte Simon*, 208 U. S. 144, 28 Sup. Ct. 238, 52 L. ed. 429. Later the case came up on Simon's appeal from the decree granting the injunction. 236 U. S. 115, 35 Sup. Ct. 255, 59 L. ed. 492. In passing on Simon's appeal, the court, quoting from Marshall v. Holmes, 141 U. S. 597, 12 Sup. Ct. 65, 35 L. ed. 870, said: 'Authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it if the facts justify such relief, adjudge that Meyer shall not enjoy the inequitable advantage obtained by his judgments A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. It would simply take from him the benefit of judgments obtained by fraud.' And if a United States court can enjoin a plaintiff from using a judgment, proved to be fraudulent, it can likewise enjoin him from using a judgment absolutely void for want of service . . . 'In that case, finding that service on the Secretary of State under the Louisiana statute would not be effective to give the state court jurisdiction over a nonresident defendant as to a cause of action arising in another state, the Supreme Court, without passing on the question of fraud, affirmed the decree of the Court of Appeals granting the relief sought."

From an examination of the opinion of the court below, which will be found at pages 54 and 55 of the record, it appears that the court did not consider the amended complaint with a view to determining the sufficiency of the

facts stated therein to constitute an equitable cause of action for an injunction. The learned judge seems to have been under the impression that the suit was brought to enjoin pending proceedings in a state court. In this he was clearly mistaken. The injunction prayed for was for the purpose of preventing the individual, Walter T. Apple, from attempting to enforce an unconscionable and void judgment. It was not sought to enjoin the state court, nor to in any way interfere with any pending proceedings therein.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed, and the case remanded with instructions to proceed with the case upon the merits.

A. SCOTT THOMPSON,
JOHN S. DEAN,
HARRY W. COLMERY,
Attorneys for Appellant.

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 124.

WESLEY M. SMITH, APPELLANT,

vs.

WALTER T. APPLE, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

REPLY BRIEF AND ARGUMENT ON BEHALF OF APPELLANT.

A. SCOTT THOMPSON,
JOHN S. DEAN,
HARRY W. COLMERY,
Attorneys for Appellant.

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REPLY BRIEF AND ARGUMENT ON BEHALF OF APPELLANT.

I.

Jurisdiction of the Court Below is the Sole Question to be Decided by This Court.

Counsel for appellee have not seen fit to discuss the jurisdictional question. We infer, therefore, that they do not seriously contend but that the court below was in error in holding that it had no jurisdiction under the provisions of section 265 of the Judicial Code to hear and determine the

case upon the merits. Upon that point we are content to submit this case upon the authorities cited in our original brief. Apparently conceding that the court below did have jurisdiction to hear and determine the case upon the merits, notwithstanding the provisions of Section 265 of the Judicial Code, counsel argue the case upon the theory that the amended petition below does not state facts sufficient to constitute a cause of action. Their theory would seem to be that, although the court below was in error in holding that it had no jurisdiction, nevertheless, this court will inquire into the merits of the case, and if it appears that the decision can be sustained upon some other ground the judgment dismissing the case below will be affirmed. We do not understand this to be the law. In appeals taken from the United States District Court to this court under the provisions of Section 238 of the Judicial Code, only the question of the jurisdiction of the court below will be considered.

> "The whole question is not open to us but only the question of jurisdiction."
>
> Mexican Central R. R. Co. *vs.* Eckman, 187 U. S., 429.

> "The Supreme Court is concerned only with the correction of the conclusion reached in the court below as to the question of jurisdiction."
>
> Chicago *vs.* Mills, 204 U. S., 321.

See also the following decisions to the same effect:

McLish *vs.* Roff, 141 U. S., 661.

Passavant *vs.* U. S., 148 U. S., 214.

American Sugar Refining Co. *vs.* New Orleans, 181 U. S., 277.

United States *vs.* Larkin, 208 U. S., 333.

Gilbert *vs.* David, 235 U. S., 561.
Southern Pacific R. R. Co., 228 U. S., 137.
United States *vs.* Congress Construction Co., 222 U. S., 149.
The Resolute, 168 U. S., 437.
Male *vs.* Atchison, etc., R. R. Co., 240 U. S., 97.

The court below held that it was prohibited by the provisions of section 265 of the Judicial Code from granting the relief prayed for in the amended complaint. In other words, the court held that it was prohibited from passing on the merits of the case on account of the provisions of a statute of the United States. This was a denial of its jurisdiction.

> "Jurisdiction is the power to adjudicate a case upon the merits and dispose of it as justice may require."
> *The Resolute*, 168 U. S., 437.
> United States *vs.* Congress Construction Co., 222 U. S., 199.

If the court below had sustained the motion to dismiss upon any other ground except lack of jurisdiction to grant the relief prayed for, the appellant might have amended the complaint so as to have stated additional facts to meet the views of the court below, but when the complaint was dismissed for want of jurisdiction to enjoin the appellee from enforcing the alleged judgment and decrees there was nothing left for the appellant to do except appeal to this court. If the decision had been based upon a finding by the court that the amended petition did not state facts sufficient to constitute a cause of action, this court would have had no jurisdiction to review the decision upon appeal, and the case could only

have been appealed to the United States Circuit Court of Appeals. On the other hand, as the case was decided solely on a question of jurisdiction (see order allowing appeal, Transcript, page 56), the Circuit Court of Appeals has no jurisdiction to review the decision. Moreover, the statute, granting the right of appeal in cases of this kind directly from the United States District Court to this court impliedly, at least, limits the inquiry in this court to the question of jurisdiction. The particular clause of the statute referred to reads as follows:

> "* * * in any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

II.

Denial of the Writ of Certiorari is Not Conclusive.

The granting of a writ of certiorari in any case may not be claimed as a matter of right, but is wholly discretionary with this court.

> "It is also the general rule as to the writ of certiorari when sought as between private parties and on the ground that the proceedings below are void, that it will be granted or denied in the sound discretion of the court and will be refused where there is a plain and adequate remedy by appeal or otherwise."
>
> *In re* Huguley Manufacturing Co., 184 U. S., 297.
>
> Prince *vs.* Tobin, 245 U. S., 18.

This court may have denied the writ of certiorari upon either of two grounds:

1. It may have held that, although the judgment was void, the applicant for the writ had a plain and adequate remedy by way of defense to any attempt that might be made by the appellee to enforce his void judgment; or

(2) This court may have refused the writ upon the theory that the judgment was not final.

It appears from the record that litigation in the Kansas court had not been concluded at the time the writ was applied for. The Supreme Court of that State had remanded the case to the District Court, with instructions to modify the judgment and to proceed with a final accounting and determination of the case. The additional judgment of $148,617.96 was rendered by the District Court of Cherokee County, Kansas, in a subsequent proceeding in the same case and after the application for the writ of certiorari had been denied. It has been repeatedly held by this court that it will not try cases piecemeal, and that no writ of certiorari will be granted until a final disposition of the case in the court below.

Missouri, etc., R. R. Co. *vs.* Olathe, 222 U. S., 185.

Louisiana Navigation Co. *vs.* Louisiana Oyster Commission, 226 U. S., 99.

Rio Grande Western R. R. Co. *vs.* ——, 239 U. S., 11.

Furthermore, no writ of certiorari was ever applied for in so far as the second judgment of $148,617.96 is concerned.

III.

Did the Amended Complaint in the Court Below State Equitable Grounds for the Granting of an Injunction?

Since the court below did not pass on this question nor consider the amended complaint with reference to its sufficiency as constituting a cause of action, we do not think this court will consider that question on this appeal. However, we call the court's attention to the following allegations of the amended petition as showing conclusively that an equitable cause of action was stated in the amended complaint:

(1) All the allegations of the amended bill showing that the judgments of the Kansas court were void as being attempts by that court to adjudicate title to land and immovable property in another State.

(2) It appears that the alleged judgment of $148,617.96 was rendered by the Kansas court upon the report of a referee who had been instructed by that court to proceed

> "to take an accounting of and report to the court the amount of royalties received by the respective parties, plaintiff and defendant, since the items accounted for to the referee on the former accounting, and the said referee is hereby directed to report his findings of fact and conclusions of law in reference thereto at the opening of the September, 1920, term of the court, and said referee to give due notice *to the respective parties or their attorneys of the time and place of taking said further accounting*" (Transcript, page 32).

But it is alleged in said amended complaint

> "that afterwards in the absence of this complainant and without his knowledge the said referee proceeded *ex parte* to take such an accounting and report his findings to the said District Court of Cherokee County, Kansas, and afterwards still proceeding *ex parte* and without any knowledge or notice to this complainant the said District Court of Cherokee County, Kansas, entered a judgment against this complainant in accordance with the findings and conclusions of said referee" (Transcript, pages 15 and 16).

(3) It further appears from the allegations of said amended complaint that since the adjudications of the Kansas court some of the most valuable of the leasehold estates located in the State of Oklahoma which were the basis of the accounting and judgments against the appellant by the Kansas court have been brought into litigation by claimants in the State of Oklahoma and that the title to one, at least, of the most valuable leases has been canceled by a Federal court having jurisdiction, and that a suit is pending in the Oklahoma courts against the appellant for $455,000, alleged to be the profits derived from said leasehold estate by him. This means that the same leasehold estate which the Kansas court held to be the property of the alleged partnership of appellant Smith and which formed in a large part the basis for the accounting and judgments against the appellant in the Kansas court has been declared void and the appellant required to account to a third party for the proceeds of all minerals taken therefrom. In other words, the United States courts for Oklahoma having jurisdiction have

held that neither the appellant nor claimant had any title to a valuable leasehold estate which entered into the Kansas litigation, and that the appellant must account to a third party for all minerals taken therefrom. The allegations of the amended complaint further show that other valuable leasehold estates located in the State of Oklahoma and which the Kansas court adjudged to belong to the firm of Apple & Smith are likewise involved in litigation brought by claimants in Oklahoma, which, if successful, would subject the complainant to further accounting to Oklahoma claimants not parties to the Kansas litigation for the rents, profits, and issues received by the complainant from such leasehold estate. There is no question about the jurisdiction of the Federal and State courts in Oklahoma over these suits. If decided adversely to the appellant, he will be compelled to account to other claimants for the very same property, royalties, minerals, rents, and profits adjudged against him and in favor of the appellee by the Kansas court. It seems too plain for argument that, in view of these allegations, no court could have held that the amended complaint filed in the court below did not state facts sufficient to constitute a case for equitable relief.

IV.

Were the Judgments and Decrees Rendered by the Kansas Court and Which the Appellant Sought to Enjoin the Appellee from Enforcing Void?

We do not think this court will enter into a consideration of the question above stated, but, out of an abundance of

caution, we have prepared a brief upon this question which is attached herewith as Appendix A.

For the reasons stated, we respectfully submit that the decision of the court below should be reversed.

A. SCOTT THOMPSON,
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Attorneys for Appellant.

APPENDIX A.

Statement of Facts Relating to the Validity of the Kansas Judgments and Decrees.

The original suit in Cherokee County, Kansas, was brought by the appellee, W. T. Apple, against Wesley M. Smith the appellant (a copy of the petition in said suit will be found in the transcript at pages 21 to 26, both inclusive).

The petition alleged a "*joint arrangement, enterprise and joint venture,*" between the parties to the suit, "to take mining leases upon the lands belonging to the Quapaw Indians and divers persons located in Ottawa County, Oklahoma, and elsewhere, and for the purpose of taking mining leases in Cherokee County, Kansas, from divers persons, and for taking leases in both of said states for the purpose of agriculture, hay and other business for such time and upon such terms as could be best obtained for the purpose of prosecuting, mining, subleasing and developing the same."

The answer was a specific denial of the alleged "joint arrangement" or partnership and of any ownership by Apple of any interest in the leasehold estates described in the petition (Tr., 7), and the jurisdiction of the court to inquire into or determine the title to the mining leases owned and developed by the said Smith in the State of Oklahoma was challenged (Tr., p. 7).

The District Court of Cherokee County, Kansas, at the conclusion of the first hearing in the case adjudged that the plaintiff, Walter T. Apple (appellee herein) was a one-half owner in the estate vested in the said Smith by virtue of the leases held by him (Smith) on certain mineral lands in Ottawa County, Oklahoma, and upon the coming in of the referee's report, containing a *partial* accounting only, rendered a judgment against the said Smith for $55,042.03½, the same being the balance found against Smith upon the

partial accounting, and which did not take into the account any outstanding claims of creditors, nor any adverse claims to the alleged partnership property itself, and further decreed "that a receiver be appointed to collect the royalties accruing from said leases and sell said leases, and that for such purpose plaintiff and defendant are each to assign to said receiver such leases, so that the same may be sold by said receiver, and that the money arising from such sale be divided equally between the plaintiff and defendant, etc." (Tr., pp. 27 to 29).

At this point in the proceedings the case was appealed to the Supreme Court of Kansas, where it was modified and remanded to the District Court of Cherokee County, Kansas, with directions to change its former order directing the appellant to convey the Oklahoma leasehold estates to a receiver, so that the decree would require the appellant to convey the same to the firm of Apple & Smith. Such conveyance, however, was never made. Thereupon the lower court again referred the case to a referee

> "to take an accounting of and report to the court the amount of royalties received by the respective parties, plaintiff and defendant since the items accounted for on the former accounting."

Upon this second accounting an "additional" judgment was rendered against the appellant in the sum of $148,617.96, the same being for the royalties received after the former accounting and *one-half of the value of the Oklahoma leasehold estates.*

These judgments and decrees were based exclusively upon accounting of the rents alleged to have been received by Smith from the leasehold estates owned by him in Ottawa County, State of Oklahoma and the value of said estates (Tr., p. 8).

It further appears from the record that in June, 1920 (after the appellee had set up a claim to a one-half interest

in the said leasehold estates), two suits were brought in the District Court of Ottawa County, State of Oklahoma, to quiet the title to said leases as against the said W. T. Apple.

One of these suits was brought in the name of Wesley M. Smith and involved certain of the leasehold estates claimed by the said Smith to be his exclusive property, and the other was brought in the name of said Smith and one Pottorff who, with the said Smith, claimed the ownership to certain of the other leasehold estates involved in this litigation and situated in said county of Ottawa, State of Oklahoma.

The appellee, W. T. Apple, was personally served with summons in each of these cases and personally appeared, filing an answer in each suit. Each of these suits went to final judgment in the District Court of Ottawa County, Oklahoma, and in each of the cases it was finally held and determined by the court that the said W. T. Apple "*did not have, and never had, any interest whatever in any part of the leasehold estates*" (Tr., pp. 12 to 15, both incl.).

It further appears from the record in this case that at the time of the commencement of the original suit of Apple *vs.* Smith in the District Court of Cherokee County, Kansas, there was pending in the United States courts for the eastern district of Oklahoma certain suits by the Indian owners of the fee-simple title to the lands covered by the leasehold estates in Ottawa County, Oklahoma, involved in that litigation, which involved the validity of Smith's title and interest in and to the most valuable leases involved in the Kansas litigation, and which leases *produced all the revenue* out of which the accounting was had against Smith and the basis for the money judgments against him. One of these cases (W. P. McCullough *et al. vs.* Wesley M. Smith) is reported in 243 Fed., 823 (Tr., pp. 16 and 17).

It further appears from the record that various suits were at the time or have since been begun by various Oklahoma claimants and are now pending against the said Wesley M. Smith in the State courts of Oklahoma and in the Federal

courts for the eastern district of Oklahoma, in which said suits the validity of the leasehold estates in Ottawa County, Oklahoma, are brought into question by sundry citizens of Oklahoma. These suits likewise demand an accounting for all minerals taken by Smith from said leasehold estates and involve the identical leasehold estates and minerals taken therefrom which were adjudged in the Kansas court to be the joint property of W. T. Apple and Wesley M. Smith and which formed the basis for the accounting, judgment, and decree rendered against Smith in favor of Apple in the Kansas litigation. A full statement of the facts in regard to these suits appears in the record at pages 17 and 18, both inclusive.

ARGUMENT.

This case was decided by the court below upon a motion to dismiss filed by the appellee, who was the defendant below. In the consideration of such a motion the allegations of the amended complaint must be taken as true.

The amended complaint alleged as grounds for the relief prayed for that the judgments and decrees of the Kansas court were void, and all of the facts which rendered them void were stated therein, as well as many other facts occurring subsequently to the rendition of said judgments and decrees, which made it inequitable and unconscionable to enforce them.

The question, therefore, to challenge the consideration of this court in this connection is:

I.

Were the Judgments and Decrees of the District Court of Cherokee County, Kansas, in the Case of Apple vs. Smith Void?

That these judgments were and are void is demonstrated by a consideration of the following propositions:

1. *The Subject-matter of the Action.*

It appears from the allegations of the amended complaint that the judgments and decrees were based exclusively upon an accounting of proceeds derived from the enjoyment of certain leasehold estates standing in the name of Wesley M. Smith, one of the parties to the suit, located in the State of Oklahoma and claimed by Smith as his individual property (Tr., p. 7, fifth paragraph).

That leasehold estates, such as those involved in this case, especially after the same have been developed and mineral is being removed, as is the case here, are land and constitute immovable property is not left in doubt.

The Kansas Supreme Court in its opinion filed in the original case said:

> "The rights of the parties were determined, including their partnership right in land and mining leases of land situate in this and another State (Tr., 42, beginning at middle of line 13).

As a matter of history relating to the lands in controversy, the lands are Indian lands and the mining leases are executed by authority of the Act of June 7, 1897.

30 U. S. Stat., 72.

This act was construed in the case of the United States *vs.* Noble, 237 U. S., 74.

The lands were allotted to the Indians under Act of March 2, 1895.

28 U. S. Stat., 876, 907.

The lands were patented to the Indians with restrictions against alienation and, except for the leasing act above mentioned, a mining lease would be an alienation.

In the case of United States *vs.* Noble, 237 U. S., 74, the court in the opinion, at page 80, has this to say:

> "Under his patent, the allottee took an estate in fee, subject to the limitation that the land should be inalienable for the period of twenty-five years from date. This restriction bound the land for the time stated, whether in the hands of the allottee or his heirs. Bowling *v.* United States, *supra.* It put it beyond the power of him or of them, to alienate the land, or any interest therein, in any manner except as permitted by the acts of 1896 and 1897. See Taylor *v.* Parker, 235 U. S., 42. The comprehensiveness of the restriction was modified only by the power to lease; and while the allottee could make leases, as provided in these acts, they gave him no power to dispose of his interest in the land subject to the lease, or of any part of it. The rents and royalties were profit issuing out of the land."

A lease would be an alienation of the land. Eldred *vs.* Okmulgee Loan & Trust Company, 22 Okla., 742; 98 Pac., 929.

property in land and the right of their enjoyment; as servitudes; rent charges; the property in the surface as severed from that on the sub-soil, or vice versa; future estates; or particular ones limited in operations; rights of mortgage, pledge or lien, *the equitable ownership as severed from the legal, or vice versa;* and if there be any other real right falling short of the dominion of the soil." Wharton on Conflict of Laws, 3d Edition, Vol. 1, Sec. 286.

"The contract in question in the case at bar is, moreover, a contract relating to real estate, and it is well settled that such contracts are governed by *lex loci rei sitae.*" Roller *v.* Murray (Virginia), 59 S. E., 427.

"Whether a trust interest has been created in land lying in a sister state is to be determined by the laws of that state." Acker *v.* Priest, 92 Iowa, 610, (4th headnote).

These leasehold estates had a local habitation and status in Oklahoma. They were not carried about by the owner in his breast pocket nor did they find their *situs* in the pigeon hole where the paper document which evidenced the character and extent of the estate happened to be deposited. Those carved out of the Fish and Douthat lands were highly developed and extremely valuable and constituted the real prize for which the plaintiff was contending. All the contention and evidence relative to the other transactions was mere manœuvre—strategy—camouflage—by which the plaintiff sought to approach and capture the real object of his attack, to wit, the rich deposits of ore in the Fish and Douthat lands.

2. The Kansas Judgment Provided for the Sale of Property in Another State Through the Instrumentality of Its Own Receiver and for the Distribution of the Proceeds.

The original decree adjudges that "The plaintiff and defendant are equal owners as partners" in said leases (located in the State of Oklahoma), and thereupon "the court further finds, adjudges and decrees that a *receiver* be appointed to collect the royalties accruing from said leases and *to sell said leases*, and that for such purpose the plaintiff and defendant are each to assign *to said receiver* such leases, so that they may be sold *by said receiver*." It therefore appears that a court in the State of Kansas, having first adjudicated conflicting claims to the title of immovable property located in the State of Oklahoma, decrees a sale of such property *under the direction of the Kansas court and by an officer of the Kansas court*.

A receiver is simply an arm of the court. A sale by a receiver is a sale by the court.

> "The rule, that ordinarily a receiver appointed by a court having jurisdiction to make the appointment is an officer of that court, having only such power as the order of the court under the general principles of law and due course of procedure may confer upon him, or such as may be conferred upon him by statute; that his possession is the possession of the court, and property thus placed in his hands is in *custodia legis*, is so fully recognized that citation of authorities in support of the rule seems unnecessary.
>
> "Prominent among the decisions so holding are the cases of Booth *v.* Clark, 17 Howard, 331, and Davis *v.* Gray, 16 Wallace, 217." Texas & Pacif. Ry. Co. *v.* Gay, 86 Texas, 585.

The Supreme Court of the State of Texas, having under consideration precisely the question here involved in the case

of receiver of railroad property (and this decision applies to the rolling-stock as well as the immovable tracks and right of way), disposed of the matter in the following clear-cut language:

> "If the railway corporation could have been compelled to convey its property here situated to the court's receiver * * * this would not remove the difficulty as to jurisdiction, for if the receiver could thus be clothed with title to the property, the disposition of it would rest on the decrees of the court appointing him; for these are the foundation of every judicial sale, or disposition of property through a court when not made on account of an existing right to property *through the person to whom it ought to be conveyed*. Without reference to the decrees of any court, the receiver's possession would still be the possession of the court. Let the matter be obscure as it may in such cases, the court acts directly on the property as well as if it be sold, conveying it if it be conveyed, and possesses it if it be in any manner placed in the hands of its receiver." Texas Pacif. Railroad Co. *v.* Gay, 86 Texas, 596-7.

In Mosby *vs.* Burrough, 56 Texas, 396, a corporation owned property in Tennessee and also in Texas. A receiver was appointed by a court of chancery in Tennessee. The corporation, by direction of the Tennessee court, conveyed its property in Texas *to the receiver*. Thereupon the receiver undertook to claim the property in Texas against attaching creditors. The Supreme Court of Texas "refused to recognize his right or the jurisdiction of the court that appointed him to affect in the manner attempted land situated in this State."

In Morris *vs.* Hand, 70 Texas, 481, it appeared that one Hand was sued by one Fox for the specific performance of a

contract to convey land located in Texas. The parties were residents of the State of New York and the suit was brought there. The New York court ordered Hand to make a conveyance of the property, through its jurisdiction, *in personam*. Before complying with the decree, Hand became insane and one Brown was appointed "committee of his estate," and, in pursuance of the decree ordering him to do so, Brown conveyed the land to Fox. In a controversy between the heirs of Hand and a person holding under the conveyance made by Brown it was held to be "settled without conflict of authority that courts of one country or state have no authority under any circumstances to divest the title to real estate situated in a foreign state or country or to direct the sale of such land to be made by anyone occupying a fiduciary capacity."

In White *vs.* White, 7 Md., 210, a decedent owned land in Maryland and Pennsylvania. All of the heirs lived in Maryland. All agreed that the land should be sold by the court through a master and the proceeds distributed. All the heirs were in court. The bill in chancery asked a decree for the sale of all the land. The court dismissed the bill as to the Pennsylvania land and granted relief as to the Maryland land. All the parties were in agreement and the refusal to decree a sale of the Pennsylvania land seems to have been wholly on the part of the court. The matter was appealed to the Supreme Court and the chancellor said:

> "It would be rather an idle thing in chancery to entertain jurisdiction of a matter not within its reach, and make a decree which it could have no power to enforce, or to compel compliance with. *And the absence of that very power is a good test by which to try the question of jurisdiction.* It would be a solecism to say that the chancellor has jurisdiction to decree *in rem* where the thing against which the decree goes and is alone the subject of, and to be

operated upon by it, is beyond the territorial jurisdiction of the chancery court, and not subject to its authority, and the decree, if passed, would be nugatory for the want of power, or jurisdiction to give it effect. The chancery can have no jurisdiction where it gives no relief. Now what jurisdiction has the chancery court of Maryland over lands lying in a foreign country, or in another State? And having no jurisdiction of lands so situated, what authority has it to decree a sale of them and *impart to its trustee* authority to go into such State or foreign country, to carry its decree into effect, by making sale of them. * * * But in this case, the bill seeks to sell land in Pennsylvania, not within the jurisdiction of the court of chancery of Maryland and the decree if made would not be *in personam* but for the sale of land *through the instrument of a trustee* and could not be enforced by any process of this court."

To the same effect Wilson *vs.* Braden, 48 W. Va. Rep., 199.

The Supreme Court of Kansas affirmed the original decree of the District Court of Cherokee County, including the provision which it contained for the appointment of a receiver of that court to take possession of, administer, and sell the real estate described in the petition and located in the sister State of Oklahoma.

Upon the second motion for a rehearing, however, the court modified this decree by directing that the defendant Smith be required to execute a *conveyance* of the property in Oklahoma to the alleged firm of Apple & Smith.

3. *The Kansas Court Had no Jurisdiction of the Subject-matter of the Suit.*

A clear vision of the powers and jurisdiction of the Kansas court arises from the consideration of a few elementary

and undisputable principles relative to the limitations upon the judicial powers and activities of the several States. The geographical boundaries of a State limit the exercise of its judicial powers as rigidly as its executive and legislative powers. The decree of a court has no greater territorial application than an act of the Legislature. It matters not whether the decree of a court be founded upon principles of law or equity—in either case its authority and effectiveness ceases at the State line. A Kansas sheriff cannot levy an execution of a Kansas court on property in Oklahoma, nor can an Oklahoma sheriff enforce in Oklahoma an execution issued out of a Kansas court. The judgment or decree of a Kansas court cannot be filed with the recording officers of another State so as to constitute a lien on property in such other State. In brief, the judgment and decrees of the court of one State are as if they did not exist after its geographical boundaries are passed—except in so far as the provisions of the Constitution of the United States, which applies to *all the States*, has modified the situation by that provision which declares that full faith and credit shall be given to the judgments and decrees of the courts of a State in every other State. But an unbroken line of judicial interpretation has established the rule that the full-faith-and-credit provision applies only to judgments *in personam*. The orderly administration of justice forbids that the courts of one State should adjudicate *titles* to property in another State. If it were not so, inextricable confusion would arise. Hence the rule that all actions affecting land or immovable property are *local* and must be brought in the State of the *situs* of the property. Accordingly it is held that full-faith-and-credit provision of the Federal Constitution does not apply to judgments or decrees affecting title to property, movable or immovable, located in another State:

> "The provision in the statutes of the United States which provides that full faith and credit shall be given in each State to the judicial proceedings of

every other State, applies only to personal obligations, duties, contracts and liabilities other than those which affect interests in real estate." Courtney *vs.* Henry, 114 Ill. App., 635.

To the same effect:

City Ins. Co. *vs.* Commercial Bank, 68 Ill., 355.
Vol. 1, Pomeroy's Equity Jurisp., 14th Ed., Sec. 298, p. 583 *et seq.*
Lamkin *vs.* Lovell, 176 Ala., 334.
Clam *vs.* Givens Admr., 106 Va., 145.
Fall *vs.* Eastin, 215 U. S., 1.

Upon the facts as above stated, the suit was clearly of a *local* and not of a transitory nature. The real question involved in the suit was whether the leasehold estates located in the State of Oklahoma, standing in the name of the defendant Smith, held in his possession, and claimed by him to be his private, individual property, were in truth and in fact his individual property or the property of the alleged firm of Apple & Smith. All inquiry in the case—all evidence—all the circumstances converge upon this one point, to wit, Was this title vested in and owned by the individual Wesley M. Smith or the firm of Apple & Smith?

"It is to the principal question involved in any case that the court looks to determine whether the action is local or transitory in its nature; and if such question relates to land, the action is local and must be maintained in the place where the land is located." 28 Appeal Cases D. C. 288; Ellinwood *vs.* Marietta Chair Co., 158 U. S., 105.

"The line between actions termed local and transitory, in some of the decided cases, becomes shadowy; but in no case can a suit the purpose of which is to subject certain property, whether real or personal, to

payment of a debt, or to have it placed in possession of and under control of a court for any purpose of administration, be termed other than a local action. Texas & Pacific Ry. Co. *vs.* Gay, 86 Texas, 594.

4. *Jurisdiction to Make an Accounting.*

We come now to the very interesting and difficult question of the effect of a judgment *in personam* in cases of this character.

That courts of equity in one State, having jurisdiction over the *person* of a defendant, may order him to convey land standing in his name in another State to the person decreed to be the equitable owner thereof and to enforce such a decree by constraint of the person of the defendant seems to be established by the authorities.

Such a conveyance, although procured by a sort of judicial duress, is treated as valid by the foreign State.

It will be noted that this leaves the courts of the State in which the property is located untrammeled in the exercise of its jurisdiction over the property. Creditors, lienholders, owners, and all claimants residing in the State of the *situs* of the property are not affected otherwise than by an ordinary conveyance from one individual to another. But no State will permit the courts of another State to *administer* property having a *situs* within its boundaries. No courts, except those within whose jurisdiction the property to be affected is located, have the power to bring before them all rival claimants and to determine all conflicting claims growing out of the ownership, possession, or use of such property. The *lex loci rei sitæ* only can be invoked to determine the rights and liabilities of creditors, lienholders, claimants, and owners of such property.

It follows that where, in proceedings *in personam*, a court in one State decrees the conveyance of property located in

another State, compliance with the decree is a condition precedent to the exercise of any further jurisdiction, in so far as the property or any claims or liabilities connected with the use, occupation, or ownership thereof is concerned. The title to the property must first be determined. As between the parties, this may be considered as accomplished when the conveyance has been executed in obedience to the order of the court. Where, however, for any reason the proceedings do not result in the execution of a conveyance, which alone can affect the transfer of title to property located in a foreign State, the litigation is at an end.

In the case of Williams *v.* Nichol, 47 Ark., 254; 1 S. W. Reporter, 243, the court said:

> "The first question presented for consideration is, did the court below have jurisdiction of the subject of this action? *It is a well settled principle of law that the law of the situs governs exclusively in regard to all rights, interests, and titles in and to immovable property.* It governs as to capacity or incapacity of a testator, and the extent of his power to dispose of it, and the descent and heirship thereof, and the manner in which it shall be disposed of for the payment of debts. *No court, State or Federal, can reach or confer title, nor sell, under decree, lands situate in a State in which it does not sit. Every attempt of a court to found jurisdiction over such lands must, from the very nature of the case, be utterly nugatory.* In regard to legacies charged upon lands, the court of equity in the State in which the land lies have exclusive jurisdiction. Clopton *v.* Booker, 27 Ark., 482; Story, Eq. Jour., Sec. 602; Story, Contl. Laws, Secs. 424, 463, 474, 483, 550, 555."

In the case of Froelich *vs.* Swafford, 35 S. D., 35; 150 N W., 476, at page 478; 150 N. W. Reporter, the court said:

"It being a fundamental truth that a decree from the court of one State cannot, in itself, affect real property situate in another State, and that, for that reason, no decree rendered in such action can bring effective relief, except when, through such decree, the party against whom it is directed is forced to execute such instrument as may be necessary to protect the other party's rights (notes to Proctor *v.* Proctor), *after a decree is rendered in such an action, if the party against whom it is rendered dies or leaves the State wherein such decree was rendered without having complied with the terms thereof, the prevailing party has, in effect, achieved nothing*—he cannot record his decree in the State wherein the land is situate; he cannot sue upon it in the courts of such State; in fact, he stands where he did before suit was brought."

The Supreme Court of the United States, in the case of Fall *vs.* Eastin, 215 U. S., p. 1, in the syllabus, declares the law as follows:

"While a court of equity acting upon the person of the defendant may decree a conveyance of land in another jurisdiction and enforce the execution of the decree by process against the defendant, neither the decree, nor any conveyance under it except by the party in whom title is vested, is of any efficacy beyond the jurisdiction of the court. Corbett *v.* Nutt, 10 Wall., 464.

"A court not having jurisdiction of the *res* cannot affect it by its decree nor by a deed made by a master in accordance with the decree."

In the case of Harris *vs.* Pulliam, 84 Ill., 20, it is said:

"A court whose decree will leave a party in peril of being subject to another may be directly opposite

decree or judgment in regard to the same property in a different jurisdiction is not in a condition to do complete justice in the case and should, therefore, decline to entertain jurisdiction."

To the same effect

Oakman *vs.* Small, 282 Ill., 360-364.

"The course pursued may lead to opposing decrees in different States and this fact is of itself a good ground for declining to entertain jurisdiction."

Davis *vs.* Cornue, 151 N. Y., 172 at p. 182.

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4. Section 265 of the Code is not a jurisdictional statute, but a mere limitation upon the general equity powers of the federal courts, preventing relief by injunction in the cases covered by it. P. 278.
5. An appeal from the District Court, involving only the merits but mistakenly brought here as involving only that court's jurisdiction, will be transferred to the Circuit Court of Appeals, under the Transfer Act of September 14, 1922, Jud. Code, § 238a. P. 280.

Case transferred to Circuit Court of Appeals.

DIRECT appeal from a decree of the District Court dismissing, for want of jurisdiction, a suit to enjoin enforcement of judgments recovered by the defendant in a state court.

Mr. John S. Dean, with whom *Mr. A. Scott Thompson* and *Mr. Harry W. Colmery* were on the brief, for appellant.

Mr. Edward E. Sapp, with whom *Mr. P. P. Campbell* was on the brief, for appellee.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The record presents a preliminary question as to our jurisdiction of this appeal. This we must consider, although not raised by counsel. *Stevirmac Oil Co.* v. *Dittman*, 245 U. S. 210, 214.

This is a suit in equity brought in the District Court by a citizen of Oklahoma against a citizen of Kansas to enjoin the latter from enforcing certain judgments that he had recovered against the plaintiff in a state court—which were alleged to be unconscionable and void—and, incidentally, from further prosecuting a suit in the District Court that had been brought by him against a surety on a supersedeas bond given by the plaintiff in the course of the proceedings in the state court. The amount involved, exclusive of interest and costs, exceeds $3,000.

The defendant moved to dismiss the suit on two grounds: 1st, for want of jurisdiction, because the diver-

sity of citizenship had not existed at the time the judgments were rendered; and, 2nd, for want of "a valid cause of action in equity." The District Judge, on consideration of this motion, handed down a memorandum in which—without passing upon the jurisdictional question raised by the motion—he said: "In examining the matter I am constrained to believe in so far as restraint of further proceedings in the courts of the state are concerned, the injunction prayed for in this suit is within the letter and spirit of the prohibition of Section 265 of the Judicial Code, . . . and that the motion to dismiss interposed in this suit should be sustained." A decree was thereupon entered dismissing the suit, at the costs of the plaintiff, "for the reasons stated" in the memorandum. Thereafter the appeal to this Court was allowed by another District Judge, sitting by assignment; his order allowing the appeal reciting that the decree dismissing the suit "was made upon consideration solely of the question of the court's jurisdiction of the said action under the provisions of Section 265 of the Judicial Code."

Section 238 of the Judicial Code—reënacting a like provision in the Act of March 3, 1891, c. 517, 26 Stat. 826,—provides that appeals and writs of error may be taken from district courts direct to this Court in cases "in which the jurisdiction of the court is in issue", in which case that question alone shall be certified from the court below for decision.[1]

We assume for present purposes that in matter of form the recital in the order allowing the appeal that the suit was dismissed "upon consideration solely of the court's jurisdiction" of the action under § 265 of the Code, is a sufficient certification of a jurisdictional question. See

[1] The Act of 1891 related to direct appeals and writs of error from the then existing circuit courts as well as district courts. Decisions under that act as well as the Code, are cited in this opinion without distinction in this respect.

Excelsior Pipe Co. v. *Bridge Co.*, 185 U. S. 282, 285. Coming, however, to the matter of substance, it is clear that the suit was dismissed solely upon the ground that in the opinion of the District Judge the court was prohibited by § 265 from granting the injunction sought by the bill. True it is that where a district court dismisses a suit upon the specific ground of want of jurisdiction, this Court, upon a sufficient certificate, acquires jurisdiction of a direct appeal, and, whatever the ground assigned by the district court for the supposed want of jurisdiction, must determine whether or not that court had and should have exercised the jurisdiction thus denied. *Excelsior Pipe Co.* v. *Bridge Co., supra*, p. 285; *The Ira M. Hedges*, 218 U. S. 264, 270; *Louisville Railroad* v. *Telegraph Co.*, 234 U. S. 369, 377; *Public Service Co.* v. *Corboy*, 250 U. S. 153, 159. But where, as in the present case, a decree of the district court does not purport to be based upon a question of its jurisdiction, a subsequent certificate characterizing the ground of the decision as one involving its jurisdiction, does not authorize this Court to entertain the appeal unless the question certified presents an issue as to "the jurisdiction of the court" within the meaning of § 238 of the Code. *Smith* v. *McKay*, 161 U. S. 355, 357; *O'Neal* v. *United States*, 190 U. S. 36, 38; *Bien* v. *Robinson*, 208 U. S. 423, 427; *Darnell* v. *Illinois Railroad*, 225 U. S. 243, 245; *Stevirmac Oil Co.* v. *Dittman, supra*, p. 214; *DeRees* v. *Costaguta*, 254 U. S. 166, 172.

Does the dismissal of a suit in equity upon the ground that the court is prohibited by § 265 of the Code from granting the relief sought by the bill, involve an issue as to "the jurisdiction of the court" within the meaning of § 238 of the Code?

Under the latter section, as interpreted by repeated decisions of this Court, the jurisdiction of the district court is in issue only when its power to hear and determine the cause, as defined and limited by the Constitution or

statutes of the United States, is in controversy, *Smith* v. *McKay, supra,* p. 358; *Mexican Railway* v. *Eckman,* 187 U. S. 429, 432; *O'Neal* v. *United States, supra,* p. 37; *United States* v. *Construction Co.,* 222 U. S. 199, 201; *The Pesaro,* 255 U. S. 216, 218; that is, shortly stated, when "its power to entertain the suit under the laws of the United States" is in issue. *Louisville Railroad* v. *Telegraph Co., supra,* p. 371. Where a district court is vested with jurisdiction of a cause—as where diversity of citizenship exists and the matter in controversy is of the requisite value—the question whether as a court of equity it has power to entertain the suit and afford the plaintiff equitable relief, does not present a jurisdictional issue. *Bien* v. *Robinson, supra,* p. 427. Such an issue is not presented by the question whether there is want of equity in the bill, *Smith* v. *McKay, supra,* p. 358; *Building Association* v. *Price,* 169 U. S. 45, 46; *World's Columbian Exposition* v. *United States,* (C. C. A.) 56 Fed. 654, 666; as whether its allegations are sufficient to entitle the plaintiff to the equitable relief sought, *Louisville Railroad* v. *Telegraph Co., supra,* p. 372; *DeRees* v. *Costaguta, supra,* p. 173, or whether it is not cognizable in equity because of a plain, adequate and complete remedy at law, *Smith* v. *McKay, supra,* p. 356; *Shepard* v. *Adams,* 168 U. S. 618, 622; *Illinois Railroad* v. *Adams,* 180 U. S. 28, 34.

So the question whether, in a suit in equity, the plaintiff is prevented by § 265 of the Code from obtaining an injunction staying proceedings in a state court, does not present an issue as to "the jurisdiction" of the district court. This section—reënacting § 720 of the Revised Statutes—provides that, except in bankruptcy cases, the "writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State". It is not a jurisdictional statute. It neither confers jurisdiction upon the district courts nor takes away the jurisdiction otherwise specifically conferred upon them

by the federal statutes.[2] It merely limits their general equity powers in respect to the granting of a particular form of equitable relief; that is, it prevents them from granting relief by way of injunction in the cases included within its inhibitions. In short, it goes merely to the question of equity in the particular bill. See *Simon* v. *Southern Railway*, 236 U. S. 115, 116, 122–124; *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 185; *Public Service Co.* v. *Corboy*,[3] *supra*, p. 160; *National Surety Co.* v. *State Bank*, (C. C. A.) 120 Fed. 593, 604. This section, as settled by repeated decisions of this Court, does not prohibit in all cases injunctions staying proceedings in a state court. Such injunctions may be granted, consistently with its provisions, in several classes of cases. See *Wells Fargo & Co.* v. *Taylor*, *supra*, at p. 183, in which many decisions on this question are collated and classified. Necessarily, therefore, in a suit in equity of which a district court has jurisdiction under the federal statutes, where the relief sought is an injunction against proceedings in a state court, it is the duty of the court to determine, under the allegations and proof, whether a case is made which entitles the plaintiff to the injunction sought, that is, whether the case presented is one in which such relief is prohibited by the statute or one in which it may

[2] Its language is similar to that in § 267 of the Judicial Code, providing that suits in equity "shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law", which does not go to the jurisdiction of the court; and in marked contrast to the provision in § 24 of the Code that no "district court shall have cognizance of any suit" to recover upon any chose in action in favor of an assignee, unless it might have been prosecuted in such court if no assignment had been made.

[3] In this case, as the decree had dismissed the bill "for want of jurisdiction", this Court was required, under the direct appeal, to determine whether the district court had the jurisdiction which it had denied; and its decree denying jurisdiction was reversed.

nevertheless be granted. *Marshall* v. *Holmes*, 141 U. S. 589, 601. Where the plaintiff has the undoubted right to invoke its federal jurisdiction the court is bound to take the case and proceed to judgment. *Kline* v. *Construction Co.*, 260 U. S. 226, 234. And when the court takes jurisdiction and determines that in the light of § 265 of the Code it is either authorized or prevented from granting the injunction prayed, its decision, whether the relief sought be granted or denied, is plainly not a decision upon a jurisdictional issue but upon the question whether there is or is not equity in the particular bill; that is, a decision going to the merits of the controversy.

In the present case the district court, as shown by the memorandum and decree, did not decline to exercise jurisdiction. On the contrary, it took jurisdiction of the cause, and, determining, upon consideration of the bill, that it was prohibited by § 265 from granting the relief sought, dismissed the bill; thereby, in effect, sustaining the ground of the motion relating to want of equity in the bill. This decision, not being upon a jurisdictional issue, but on the merits, was only reviewable by appeal to the Circuit Court of Appeals. *De Rees* v. *Costaguta, supra*, p. 173. The direct appeal to this Court was therefore improvidently allowed.

Prior to the Act of September 14, 1922, c. 305, 42 Stat. 837, this would have resulted in the dismissal of the appeal for want of jurisdiction here. *Smith* v. *McKay, supra*, p. 359; *O'Neal* v. *United States, supra*, p. 38; *Excelsior Pipe Co.* v. *Bridge Co., supra*, p. 285; *DeRees* v. *Costaguta, supra*, p. 174. That act, however, amends the Judicial Code by adding § 238(a), providing, *inter alia*, that an appeal taken to this Court in a case wherein it should have been taken to a circuit court of appeals, shall not for such reason be dismissed, but shall be transferred to that court for determination as if the appeal had been duly taken to it. As this appeal involves a question upon

the merits of the controversy which should have been taken to the Circuit Court of Appeals for the Eighth Circuit instead of to this Court, it must, pursuant to the statute, be transferred to that court.

It is so ordered.

SMITH *v.* APPLE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 124. Argued January 2, 1924.—Decided March 3, 1924.

1. Where a District Court dismisses a suit upon the specific ground of want of jurisdiction, this Court, upon a sufficient certificate, acquires jurisdiction of a direct appeal, and whatever the reason assigned by the District Court for the supposed want of jurisdiction, must determine whether that court had and should have exercised the jurisdiction thus denied. P. 277.
2. But where a decree of the District Court does not purport to be based upon a question of its jurisdiction, a subsequent certificate characterizing the ground of decision as one involving a question of jurisdiction, does not authorize this Court to entertain the appeal unless the question certified presents an issue as to "the jurisdiction of the court" within the meaning of Jud. Code, § 238. *Id.*
3. The question whether, in a suit in equity, the plaintiff is prevented by Jud. Code, § 265, from obtaining an injunction staying proceedings in a state court, does not present an issue as to the jurisdiction of the District Court, within the meaning of § 238, but one of the equity or merits of the case. *Id.*